> considered, honoring the International Private Law created by law or by treaties ratified by Brazil.[9]

In one case that highlights this legal principle, the Brazilian Superior Court of Justice, the final authority for interpretation of Brazilian federal law, held that the division of assets located in Lebanon must be considered by the Brazilian court for the purpose of distributing assets located in Brazil, correcting for any deviations from the proper percentages due to each heir under Brazilian estate law. *See* Hironaka & Monaco Decl. at ¶ 32.

Perhaps most importantly, in the Action for Concealment of Assets, the Applicants already successfully introduced the discovery obtained from the Original Application.[10] More specifically, the Applicants introduced excerpts of the documents produced by the Clearing House and the Federal Reserve pursuant to the Original Application (the "2020 American Discovery"), highlighting the transfer of over US $5 million from Zidane Imobiliária Comercial e Administradora Ltda. ("Zidane") to Menirol Sociedad Anónima ("Menirol"). *See* Third Fraga Decl. at ¶ 6. The Brazilian court found this information relevant and welcomed it, and subsequently ordered Gertrudes, Alexandre, Vivian, Evelyn, Suzana and their respective counsel in the Brazilian Proceedings to appear and respond to the new information within fifteen business days.[11] *Id.* at ¶ 7.

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[9] *See* André de Carvalho Ramos, *O Direito Internacional Privado das Sucessões no Brasil* [The Private International Law of Successions in Brazil] v. 4, n. 7, 322 (Revista de la secretaría del Tribunal permanente de revisión, 2016). DOI:10.16890/rstpr.a4.n7.p307. *See also* Third Fraga Decl. at ¶¶ 14-16.

[10] The Brazilian Court could have dismissed the 2020 American Discovery or ordered that the evidence be removed from the docket. *See* Third Fraga Decl. at ¶ 8. Instead, the Brazilian Court welcomed the 2020 American Discovery and found it relevant for purposes of the Brazilian Proceedings. *Id.*

[11] On June 23, 2021, the Gertrudes Group appeared in the Action for Concealment of Assets to respond to the May 24, 2021 motion that Applicants filed in Brazil. *See* Fraga Decl. ¶ 37. Suzana also filed a separate brief, in which she requested to be removed from the Action for Concealment of Assets. *Id.* The judge has not yet ruled on Suzana's request or on the Gertrudes Group's motion. *Id.*

In short, evidence of assets located abroad is relevant to Brazilian estate disputes, according to the Brazilian Superior Court of Justice, the Gertrudes Group's Brazilian counsel, the professor that the Gertrudes Group cited in its pre-motion letter, and Professors Hironaka and Monaco.

B. Brazilian Courts Have Jurisdiction Over Assets in Brazil Even if Those Assets Are Beneficially Owned by Offshore Structures

The discovery that Applicants seek is calculated to show that the Gertrudes Group owns and/or controls various real estate properties in Brazil through a corporate structure,[12] including at least one offshore company. This discovery is for use in the Brazilian Proceedings, as Brazilian courts have jurisdiction over real properties, regardless of where the owners are located or incorporated. *Id*. at ¶ 13; *see also* Hironaka & Monaco Decl. at ¶ 33.

C. Under Brazilian Law, Gifts are Valued at the Time of Succession, Not at the Time of the Gift

Under Brazilian law, the proper valuation method for the gift in life of Sestini Mercantil Ltda. ("Sestini") from Emanuel Benedek ("Emanuel") to his son Alexandre is the date of the succession, not the date of the gift. *Id.* at ¶ 26; *see also* Third Fraga Decl. at ¶ 22. On this point, the Gertrudes Group erroneously states: "[w]hen valuing a lifetime donative transfer for this purpose, the law uses the value of the asset at the time of the transfer." Dkt. No. 53. This rule has consistently been criticized by scholars and dismissed by courts. These critiques culminated in the enactment of the Brazilian Code of Civil Procedure of 2015, which changed the rule on valuation of gifts as follows: "the assets to be distributed in the division, as well as the attachments and improvements added by the gift recipient, shall be calculated ***at the time of the opening of the succession***." *See* Third Fraga Decl. at ¶ 22; *see also* Hironaka & Monaco Decl. at ¶ 27 (emphasis

[12] More specifically, Applicants seek information about Dorkaeff Comércio, Administração e Participação Ltda. ("Dorkaeff"), Zidane, and Menirol.

added). The Brazilian Superior Court of Justice has upheld the Brazilian Code of Civil Procedure of 2015 as the proper method for valuation of a gift. *See* STJ, Recurso Especial No. 1.698.638-RS, Relatora Min. Nancy Andrighi, 14.05.2019 (Braz.) (finding that because there is a conflict between the Brazilian Civil Code and the Brazilian Code of Civil Procedure, the most recent law should apply, and valuation should be determined at the time of succession). *See* Third Fraga Decl. at ¶ 22 fn. 9; *see also* Hironaka & Monaco Decl. at ¶ 27. Therefore, the valuation applied to Emanuel's gifts in life should be assessed at the time of succession, and the discovery requested for the last seven years is indeed relevant to the Brazilian Proceedings.

The gifts from Emanuel to Alexandre and to the Gertrudes Group in general were substantial, as outlined in the Original Fraga Declaration. Dkt. No. 49 ("Original Fraga Decl.") at ¶¶ 22-27. The valuation of these gifts should be assessed at the time of succession, together with their respective attachments and improvements, pursuant to Brazilian law. *See* Third Fraga Decl. at ¶ 22; *see also* Hironaka & Monaco Decl. at ¶ 27. As such, the discovery Applicants have requested, consisting of the evidence of Emanuel's estate assets located abroad, is useful in the Brazilian Proceedings.

D. Brazilian Law Permits Courts to Pierce the Corporate Veil to Reach Estate Assets

While some of Emanuel's gifts were carried out through complex corporate structures, Brazilian law allows Brazilian courts to pierce a corporation's veil to reach estate assets. The Applicants seek to do exactly that in the Brazilian Proceedings:

> Under Article 50 of the Brazilian Civil Code of 2002, if an individual abuses the corporate form, by using corporate resources for private ends or commingling individual and corporate funds, the judge at the request of one of the parties, or at the request of the Public Prosecutor's Office, may disregard the corporate form, and extend the obligations to the administrators or owners of the corporation, who benefitted directly or indirectly from the abuse.

See id. at ¶ 23. Indeed, the corporate form should be disregarded in the exact circumstances that occurred when Alexandre inherited the family business from Emanuel as a gift in life, and when the Gertrudes Group misused the corporate structure created by Emanuel Benedek (including Zidane, Dorkaeff and Menirol) to the detriment of the Applicants. *See id.* at ¶ 26; *see also* Third Fraga Decl. at 28-29. Professor Ana Luiza Nevares, a professor of civil law at the Pontifical Catholic University of Rio de Janeiro and a specialist in family law and estate law, has written about this issue, and her views are summarized as follows:

> It is contrary to Brazil's legal order for a person to transfer his or her assets abroad, in contravention of Brazilian estate law. If an individual has transferred his or her assets abroad in order to avoid his or her obligations under Brazilian estate law, the heirs who are harmed may have recourse to protective mechanisms, such as proportional compensation from the assets located in Brazil, to account for the undeclared assets abroad. *If the assets located in Brazil are incorporated in corporate structures based abroad, and the heir in question has made use of these corporate structures to infringe upon the rights of the remaining heirs, the corporate form may be disregarded*, and corporations holding assets located in Brazil should be inventoried in Brazil. Accordingly, heirs are guaranteed measures to protect their rights, and they are permitted to make use of evidence of foreign assets belonging to the decedent in domestic Brazilian proceedings. (emphasis added)

ANA LUIZA M. NEVARES, A Sucessão Hereditária com Bens Localizados no Exterior [Hereditary succession with assets located abroad], v. 24 no. 2, PENSAR REVISTA DE CIÊNCIAS JURÍDICAS, 1-13 (2019) (discussing the distribution of assets located abroad in a succession proceeding). *See id*. at ¶ 12. In short, Brazilian courts have the power to pierce the veil of a corporation that holds estate assets.

IV. The Gertrudes Group Misrepresents Numerous Rulings in the Brazilian Proceedings to Support Its Argument That Applicants Seek to Circumvent Foreign-Proof Gathering Restrictions

The Gertrudes Group concedes that the first and second discretionary *Intel* factors weigh in favor of the Applicants but argues that the third (circumvention) and fourth (intrusion) factors are "fatal." Dkt. No. 57. With respect to the third factor, the Gertrudes Group argues that the

Applicants "strategically elect[ed]" not to discuss related proceedings and accuse the Applicants of lack of candor. *Id*. Relying on the unpublished *WinNet* order, the Gertrudes Group urges the Court to vacate its prior orders in this case. But *WinNet* was decided under very different facts, and as the Court explained, it was one of "those ***unusual cases*** in which the Court will exercise its discretion to deny [a 1782] application." *In re WinNet R CJSC*, No. 16MC484(DLC), 2017 WL 1373918, at *9 (S.D.N.Y. Apr. 13, 2017) (emphasis added). The case was unusual because WinNet initiated ten civil actions in Russia against its opponents and lost all the lawsuits that would have supported the 1782 application. More specifically, WinNet sought discovery in connection with three categories of Russian proceedings. The Court found that the first two categories had no ongoing proceedings and that the discovery that WinNet sought had no apparent relevance to the third category of proceedings that were still ongoing. *Id*. at *8. These facts are distinguishable from the facts in this case, where the Action for Concealment of Assets is ongoing, and the Brazilian court recently received evidence that the Applicants obtained through the Original Application. Moreover, the Applicants did not "strategically elect" not to discuss the proceedings the Gertrudes Group raises in its motion. On the contrary, the Applicants focused on the proceedings that are relevant to their discovery requests. *See* Original Fraga Decl. at ¶¶ 37 and 41. *See also* Dkt. No. 22 at ¶¶ 4-8. The Gertrudes Group, on the other hand, raises unrelated proceedings[13] brought by individuals other than the Applicants or proceedings that have concluded or are unrelated to Applicants' discovery requests. *See* Third Fraga Decl. at ¶¶ 17-18 and 33-34. As set out in greater detail below, the Gertrudes Group has mischaracterized these proceedings, and in any event, they are not relevant to the issues before the Court.

[13] None of the prior proceedings cited by the Gertrudes Group have addressed the issue of concealment or omission of assets, which is being addressed in the Action for Concealment of Assets, based on the division of assets that will be carried out in the Inventory Proceeding. *See* Third Fraga Decl. at ¶ 19.

A. The First Zidane Motion

This action was not initiated by the Applicants, it ended before the Applicants filed the Original Application, and it is not relevant to the Original Application or the Second Application. *See* Third Fraga Decl. at ¶ 17. This action began in July 2016, when Suzana Benedek ("Suzana"), one of the Applicants' siblings, requested that the Brazilian court pierce the corporate veil of Zidane, Dorkaeff and Menirol. *Id.* The Gertrudes Group states, "the Probate Court rejected the First Zidane Piercing Motion *on procedural grounds*." Dkt. No. 53. In fact, Suzana voluntarily dismissed her claim and the court accepted her request. *See* Third Fraga Decl. at ¶ 17. As the Gertrudes Group concedes, the judge did not make a decision on the merits. *See id*; *see also* Dkt. No. 53.

B. The Second Zidane Motion

In October 2017, the Applicants requested documents and information, and to freeze assets left by Emanuel's estate, which were held by Zidane, Dorkaeff and Menirol. *See* Third Fraga Decl. at ¶ 18. In January 2018, the Brazilian judge denied the request, but did not make a decision on the merits. *Id.* Instead, the judge indicated that the Applicants should bring their discovery requests through an "appropriate type of action," or an Action for Concealment of Assets. *See id. see also* Dkt. No 57 at ¶ 11. The appellate court affirmed this ruling (again not on the merits). *See* Third Fraga Decl. at ¶ 18. Applicants then made their discovery requests in the Action for Concealment of Assets, and those requests are pending. *See id*. In fact, the Applicants included the 2020 American Discovery to reiterate their discovery requests in May 2021. *See id.* at ¶ 21. As a result, the judge requested that Gertrudes, Alexandre, Vivian, Evelyn, Suzana and their respective counsel in the Brazilian Proceedings appear and respond to the renewed request within

15 business days of the court's ruling.[14] *Id*. That renewed request is pending. *Id*. In short, the Brazilian court has not rejected the Applicants' discovery requests, contrary to the Gertrudes' Group's contention.

C. The Zidane & Sestini Declaratory Actions

Both actions are on appeal awaiting a final decision, and the Applicants do not seek to use the discovery sought in these appeals. In describing these actions, the Gertrudes Group omits important facts. *See* Third Fraga Decl. at ¶ 20.

On appeal, the Applicants have argued that the denial of their document request deprived them of their right to due process under the Brazilian Constitution, which provides that, "litigants…are guaranteed the right to adversarial proceedings and a full defense, with the means and resources inherent thereof." *Id*. The Applicants also argued that these judicial decisions deprived them of their right to equal treatment between litigants, denied them their right to the means of their defense, and violated the procedural requirements for granting summary judgment. *Id*. Finally, as described above, the Applicants have requested similar discovery in the Action for Concealment of Assets, which they expect will be granted. *Id.* at ¶ 21.

Moreover, Section 1782 discovery should not be denied simply because it is unavailable in a foreign jurisdiction. See *Mees v. Buiter*, 793 F.3d at 302 ("[i]f district courts were free to refuse discovery based upon its unavailability in a foreign court…§ 1782 would be irrelevant to much international litigation, frustrating its underlying purposes.") (quoting *Metallgesellschaft AG v. Hodapp*, 121 F.3d 77, 80 (2d Cir. 1997). Similarly, Intel explained that Section 1782 does not "categorically bar a district court from ordering production of documents when the foreign tribunal

[14] On June 23, 2021, the Gertrudes Group appeared in the Action for Concealment of Assets to respond to the May 24, 2021 motion that Applicants filed in Brazil. *See* Fraga Decl. ¶ 37. Suzana also filed a separate brief, in which she requested to be removed from the Action for Concealment of Assets. *Id.* The judge has not yet ruled on Suzana's request or on the Gertrudes Group's motion. *Id.*

or the 'interested person' would not be able to obtain the documents if they were located in the foreign jurisdiction." See *Intel v. Advanced Micro Devices*, 542 U.S. 241, 259–60 (2004).

V. THE TARGETED DOCUMENT REQUESTS ARE NOT INTRUSIVE

The Gertrudes Group claims that "[t]he discovery sought is indiscriminate and massively intrusive," without explanation. In determining whether a request is intrusive or burdensome, the Court should look to Rule 26 of the Federal Rules of Civil Procedure, rather than the scope of discovery available in the foreign proceeding. *See Mees v. Buiter*, 793 F.3d at 302. Moreover, "it is far preferable for a district court to reconcile whatever misgivings it may have about the impact of its participation in the foreign litigation by issuing a closely tailored discovery order rather than by simply denying relief outright." *Id*., *quoting Euromepa*, 51 F.3d at 1101. Consequently, "to the extent a district court finds that a discovery request is overbroad, before denying the application it should ordinarily consider whether the defect could be cured through a limited grant of discovery." *Id*.

As a threshold matter here, Mayer Brown represents only Gertrudes, Alexandre, Vivian, and Evelyn. Dkt. Nos. 29, 30, 33, 34. In meeting and conferring with Applicants, Mayer Brown acknowledged that the Gertrudes Group owns or controls Sestini and Timao[15] but refused to say whether the Gertrudes Group owns or control any of the other entities or individuals whose information was subpoenaed in the Original Application or the Second Application. Fourth De Luca Decl. at ¶ 17. Thus, by refusing to acknowledge any connection to the other entities or individuals, the Gertrudes Group lacks standing or any basis to claim that the discovery is

[15] Alexandre also stated in a sworn declaration that, "[m]y wife and me are the managers of a Florida company named Timão LLC, which is a private investment vehicle for us." Dkt. No. 54 at ¶ 3.

"indiscriminate and massively intrusive" as to entities and individuals other than the Gertrudes Group, Sestini and Timao (for example, Zidane, Menirol, MG3, and any others).[16]

In its motion, the Gertrudes Group is fixated on another 1782 case filed by the "same São Paulo-based Kobre & Kim team," which they cite eleven times. *In re Abdalla*, No. 20 Misc. 727 (PKC), 2021 WL 168469 (S.D.N.Y. Jan. 19, 2021). However, as the Gertrudes Group recognizes, after the Section 1782 application in *Abdalla* was denied without prejudice, the Applicants in this matter proactively narrowed their subpoenas substantially. Dkt. Nos. 13 & 24. The narrowed subpoenas, which the Gertrudes Group characterizes without evidence as "still-staggering" and "still-immodest," were nevertheless granted after the Court decided *Abdalla*. Dkt. Nos. 13 & 57.

The Gertrudes Group also complains that there are no *family* links between MG3 REIT LLC ("MG3") and the Benedek family. Dkt. No. 54 at ¶ 3. However, as noted in the Second Application, discovery resulting from the Original Application revealed a wire transfer of approximately US $700,000 from Timao LLC (a U.S. entity owned by Alexandre and his wife Deborah) to MG3 Reit LLC., using an account registered at Bank Leumi. Dkt. No. 15. Despite the important link established between Timao and MG3, to ensure that the discovery they request

[16] The Gertrudes Group also attempts to make an issue out of an alias, Alexandre R. Nobre (the "Nobre Alias"), that the Gertrudes Group well knows has already been resolved. Dkt. No. 59. Benedek and Nobre are linked in public records reports issued by Westlaw, Radaris, Accurint and White Pages. *See* Fourth De Luca Decl. at ¶¶ 12-15 and Exs. I-L. What the Gertrudes Group denigrates as a "trace linkage" consists of four public reports that show that the Nobre Alias and Alexandre are associated with the same address, phone number, and U.S. Social Security Number. *Id.*

This issue has already been resolved between the Applicants and a third-party individual also named Alexandre R. Nobre ("Mr. Nobre"), who entered into a joint confidentiality order, affirmed by this Court, providing that the Applicants will not use any "Nobre"-related records in the Brazilian Proceedings as long as they are not related to Alexandre. Dkt. No. 59. If Alexandre's claim is true that he did not use the Nobre Alias (despite four public reports indicating a link between the Nobre Alias and Alexandre), there is no harm to Alexandre. And there is no harm to Mr. Nobre, who has reached an agreement with the Applicants on this issue. *Id*.

The Gertrudes Group also references two debt collection proceedings tangentially related to Alexandre Nobre, brought against Sylvia's husband. Dkt. No. 57. Applicants note that these two proceedings were settled for a total of R$ 12,500 (approximately US $2,500) and are now over. *See* Third Fraga Decl. at ¶ 34. Applicants do not seek to use discovery in these proceedings and would enter into a protective order to that effect, if necessary. These proceedings are immaterial and irrelevant.

is reasonable in scope and not burdensome, Applicants have submitted revised subpoenas, requesting that the Discovery Subjects include documents responsive to the MG3 request only if these documents are connected to the other individuals and entities included in the revised subpoenas. *See* Fourth De Luca Decl. at ¶¶ 4-11 and Exs. A-H. Applicants have no interest in receiving discovery from MG3 that is not relevant to the Brazilian Proceedings.

Finally, the discovery that Applicants seek is neither burdensome nor intrusive to the Discovery Subjects, as the Applicants have offered to cover the reasonable costs of subpoena compliance and none of the Discovery Subjects have objected to this Court on that basis to date. *Id*.

VI. THE VARIOUS ALLEGATIONS OF A LACK OF CANDOR BY THE APPLICANTS

The Gertrudes Group wrongly accuses the Applicants of failing to exercise candor with the Court by "selectively" citing only portions of the Brazilian Proceedings. Applicants discussed the Inventory Proceeding and the Action for Concealment of Assets in their Original Application and Second Application because these are the proceedings that are relevant to the applications. The other proceedings discussed by the Gertrudes Group are simply not relevant to the analysis a district court must undertake for Section 1782 discovery, as Applicants do not seek to use the discovery in any of those other proceedings. In addition, the Gertrudes Group does exactly what it accuses the Applicants of, by misrepresenting the findings of these rulings in several ways, as set out in Section IV above.

In addition, the cases upon which the Gertrudes Group relies are inapposite. For instance, in *Deposit Ins. Agency v. Leontiev*, 2018 WL 3536083, (S.D.N.Y. 2018), the Court ultimately found that the alleged lack of candor was not misleading when read in context. ("Because statutory

and discretionary factors require this conclusion, the Court DENIES Leontiev's motion to quash the subpoena.")

The Gertrudes Group also miscasts legal argument as a lack of candor. For example, the Gertrudes Group claims that the Applicants were "actively misleading in derogation of the heightened duty of candor that attends *ex parte* proceedings" in arguing that certain financial institutions are found in the District. Dkt. No. 57. But Applicants explained in the Second Application that three of the financial institutions are not headquartered in New York. Dkt. No. 15. Having explained as much, Applicants argued successfully that these financial institutions nevertheless conduct systemic and regular business in this district and are therefore "found" here. Dkt. No. 13.

The Gertrudes Group also criticizes the Applicants for requesting a sealing order in the Original Application and for proceeding without notice to the Gertrudes Group. That the Applicants filed the Original Application "while the pandemic raged in New York City" is hardly relevant, nor is the fact that the Original Application was hundreds of pages long. The Gertrudes Group insinuates that the relief requested was granted only because "a screening clerk or a judge" did not undertake "a careful reading" of the Applicants' motion. In fact, Judge Broderick, an Article III judge in this district, granted the relief Applicants requested, and the Applicants proceeded accordingly.[17]

[17] Courts in this district have waived the notice requirement before, when "notice could provide the potential defendants with opportunity to conceal or destroy evidence." *See In re Investbank PSC*, 2020 WL 8512850, at * 2 (S.D.N.Y. 2020) (quoting *In re Hornbeam Corp.*, No. 14 Misc. 424, 2015 WL 13647606, at *5 n.14 (S.D.N.Y. Sept. 17, 2015), aff'd, 722 F. App'x 7 (2d Cir. 2018) ("Of course, where countervailing interests support a party's need to take discovery in secret, a district court can always…order, pursuant to 28 U.S.C. § 1782(a), that discovery not be taken in accordance with the Federal Rules").

In any event, even where parties issue subpoenas *without court approval*, Courts in this District decline to quash subpoenas on that basis alone. *See In re Reyes*, 2019 WL 6170901, at *3 (S.D.N.Y. 2019) ("[c]ourts in this Circuit routinely decline to quash subpoenas automatically based on noncompliance with notice requirements absent some showing of prejudice.") (quoting *In re Speer*, 754 F. App'x 62, 64 (2d. Cir. 2019).

After the Applicants' submitted the Second Application, the Court "authorized [the Applicants] to issue the Revised Subpoenas on condition that the Revised Subpoenas and a copy of this Order are contemporaneously served on he [Gertrudes Group]." The Applicants proceeded exactly as the Court ordered. In short, the Gertrudes' Group's accusations of lack of candor are baseless.

VII. THE DISCOVERY SUBJECTS RESIDE OR ARE FOUND IN THE SOUTHERN DISTRICT OF NEW YORK

The Gertrudes Group does not dispute that the Clearing House, the Federal Reserve, Citibank, Bank Leumi, and Morgan Stanley are headquartered in this district.[18] Instead, the Gertrudes Group takes issue with Schwab, Raymond James, and Sun Life because they are not headquartered in New York. Entities that are not headquartered in New York are nevertheless "found" here if the Court possesses personal jurisdiction over them—whether general or specific—consistent with due process. *See In re del Valle Ruiz*, 939 F.3d 520, 528 (2d Cir. 2019) (court has specific jurisdiction over non-parties where the discovery results from the non-party's forum contacts). And as the Supreme Court held on March 25, 2021, "substantial business" in a forum state supports specific personal jurisdiction under due process principles. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1029, 209 L. Ed. 2d 225 (2021). The Court reasoned that in conducting "so much business" in a forum state, a party "enjoys the benefits and protections of [the forums state's] laws, such that the party submits itself to the forum's jurisdiction. *Id*. The Court also explained:

[18] The Clearing House is headquartered in Manhattan and registered with the New York State Department of State. *See* Dkt. No. 48, Original E. Martin De Luca Declaration ("Original De Luca Decl."). at ¶ 8 and Ex. C; *see also id*. at ¶¶ 5, 9-10 and Exs. D-E. The Federal Reserve is headquartered in Manhattan. *Id*. at ¶¶ 5, 11, and Ex. F. Morgan Stanley is headquartered in Manhattan. *See* Dkt. No. 23, Second E. De Luca Declaration ("Second De Luca Decl.") at ¶ 17, and Ex. L. Citibank is headquartered in Manhattan. *Id*. at ¶ 16 and Ex. K. Bank Leumi is headquartered in Manhattan. *Id*. at ¶ 14 and Ex. I.

> None of our precedents has suggested that only a strict causal relationship between the defendant's in-state activity and the litigation will do … our most common formulation of the rule demands that the suit "arise out of *or relate to* the defendant's contacts with the forum." *Bristol-Myers Squibb v. Superior Court of California*, 137 S.Ct. 1773, 1780 (quoting *Daimler*, 571 U.S., at 127, 134 S.Ct. 746; emphasis added; alterations omitted); *see supra,* at 1025. The first half of that standard asks about causation; but the back half, after the "or," contemplates that some relationships will support jurisdiction without a causal showing.

Id. at 1026.

Here, the information that Applicants seek from the financial institutions includes information about payments, investments, transactions, wires, and transfers. The financial institutions carry out investment custodian services and marketing to customers in the Southern District of New York, and as alleged in the Original Application, CHIPS and Fedwire—both located in this District—constitute the primary network in the United States for both domestic and foreign large transactions denominated in U.S. dollars.[19] These contacts with the District are sufficient to confer specific personal jurisdiction over the banks. *See, e.g., Pfaff v. Deutsche Bank AG*, No. 20 MISC. 25 (KPF), 2020 WL 3994824, at *9 (S.D.N.Y. July 15, 2020) (in matter arising out of investment in silver certificate options derivative securities, finding specific jurisdiction over Deutsche Bank because the bank regularly traded in the special metals market in the District).

CONCLUSION

Based on the foregoing, Applicants respectfully ask the Court to deny the Gertrudes Group's Motion and direct the Discovery Subjects to respond to the subpoenas in accordance with such Order.

[19] See Will Kenton, Clearing House Interbank Payments System (CHIPS), INVESTOPEDIA (Apr. 17, 2018), https://www.investopedia.com/terms/clearing-house-interbank-payments-system-chips.asp. See also Payment Systems in the United States, BANK FOR INTERNATIONAL SETTLEMENTS 443 (Apr. 1, 2003), https://www.bis.org/cpmi/publ/d53.pdf ("There are two major large-value payment transfer systems in the United States: (1) Fedwire, operated by the Federal Reserve, and (2) CHIPS, operated by the Clearing House Interbank Payments Company L.L.C. (CHIPCo). Generally, these payment systems are used by financial institutions and their customers to make large-dollar, time-critical transfers. In addition, financial institutions may use separate communication systems to send payment instructions to their correspondents for the transfer of correspondent balances or to initiate Fedwire or CHIPS payments.").

Dated: June 25, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2021, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing. Parties may access this filing through the Court's CM/ECF system.

/s/ E. Martin De Luca

E. Martin De Luca

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Date of BA/BS	**May 2016**
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Date of JD/LLB	**May 22, 2022**
Class Rank	**School does not rank**
Does the law school have a Law Review/Journal?	**Yes**
Law Review/Journal	**No**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**

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March 2, 2022

Chambers of Hon. Lewis J. Liman
U.S. District Court for the Southern District of New York
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Dear Judge Liman:

I am writing to apply for the August 2024–2025 term clerkship in your chambers. I am a third-year student at the Georgetown University Law Center and upon graduation, I will be clerking in the Eastern District of Texas with the Hon. Kimberly Priest Johnson, U.S. Magistrate Judge for the 2022-2023 term. I plan to pursue a career in federal criminal litigation, ideally working as an Assistant U.S. Attorney.

During the summer and fall of 2020, I interned for Judge Kiyo A. Matsumoto's chambers and drafted approximately fifteen memorandums & orders on issues including certification of class under the FLSA, the First Step Act, and complex criminal procedure challenges in habeas petitions. In the spring and summer of 2021, I interned with the U.S. Securities and Exchange Commission's Enforcement Division with an investigative team. I aided investigations on a range of securities frauds and due to my success, I was invited to continue on for the summer term.

In fall 2021, I worked with Georgetown's Habeas Corpus Practicum to draft a prisoner's state habeas petition. This project has included intensive fact investigation of issues both on and off-the-record, culminating in a memorandum of issues related to the introduction of prior acts or wrongs evidence. Further, I drafted an academic paper tracing the history of the Excessive Bail Clause in the United States and argued that critical analysis should be placed on the commercial bail indemnification contract to ensure broad judicial discretion with significantly lower costs to indigent defendants.

I have attached the following documents - my resume; my transcripts from the Georgetown University Law Center, London School of Economics and Political Science, and the George Washington University; and a writing sample. This writing sample is the draft of a First Step Act memorandum & order written for Judge Matsumoto's chambers under the supervision of Mr. Michael Mayer. The following have submitted recommendations on my behalf and welcome inquiries:

Professor Mark MacDougall Georgetown Law; Akin Gump mmacdougall@akingump.com (202) 887-4510	Professor Christina Mathieson National Habeas Institute cm1855@georgetown.edu (202) 378-0284	Mr. Michael Mayer Sullivan & Cromwell michaelmayer87@gmail.com (330) 416-1535

Thank you for your time and consideration.

Sincerely,

Alex Nowakowski

ALEXANDER NOWAKOWSKI
12 Kensington Ct, Princeton, NJ 08540 • (570) 814-7164 • amn114@georgetown.edu

EDUCATION

GEORGETOWN UNIVERSITY LAW CENTER — **Washington, DC**
Juris Doctor — Expected May 2022
GPA: 3.76
Activities: Dean's List (Fall 2020); Institute of International Economic Law Fellow

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE — **London, UK**
Master of Science, with Merit, in International Political Economy — December 2017
Dissertation: *The Bush and Obama Administrations in the WTO - A Comparative Study of Disputes*

THE GEORGE WASHINGTON UNIVERSITY — **Washington, DC**
Bachelor of Arts, *summa cum laude*, in Economics & International Affairs; German Studies Minor — May 2016
GPA: 3.85
Honors: Deans Honor List; Delta Phi Alpha (German National Honor Society)
Activities: GW Presidential Scholarship (2012-2016); GW UNICEF Journal Founding Editor (2015-2016)

EXPERIENCE

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS — **Plano, TX**
Clerk in the chambers of the Hon. Kimberly C. Priest Johnson, U.S. Magistrate Judge — Sep. 2022 – Sep. 2023

U.S. SECURITIES AND EXCHANGE COMMISSION — **Washington, DC**
Intern, Enforcement Division — Jan. 2021-Aug. 2021

- Supporting "pump-and-dump," Foreign Corrupt Practices Act (FCPA), market manipulation, and insider trading investigations through document review, analysis, preparation of questions for witness testimony, and legal research

U.S. DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK — **New York, NY**
Judicial Internship in the chambers of the Hon. Kiyo A. Matsumoto — May 2020 – Dec. 2020

- Drafting decisions on *habeas corpus* petitions to vacate or amend judgment
- Researching sentencing enhancement application and drafting First Step Act memorandum & order
- Drafting memorandum & orders for civil law cases including social security appeals, motions to dismiss, patent infringement, Fair Labor Standards Act, and labor disputes

UBS — **New York, NY**
Global Equity Derivatives Compliance Officer — Feb. 2019 – June 2019

- Provided business-aligned compliance advisory to Derivative and Structured Product desks, and draft policy regarding Marijuana Related Businesses, complex trades, risk management, and regulatory change

Group Risk Control Analyst, Graduate Rotational Training Program — Aug. 2017 – Feb. 2019

- *Investor Corporate Solutions Compliance:* Reviewed compliance and operational risk across trading within the investment bank, with a specific product focus of cash equities and derivatives
- *Financial Crime Compliance:* Strategic management and analysis of relevant regulation for changes within the bank secrecy anti-money laundering program across the investment bank and Wealth Management
- *Leveraged Finance Credit Risk:* Performed credit analysis for leveraged financing origination within the Group Industrials & Consumer Products portfolio to provide challenge that ensures the investment bank remains within its risk appetite

THE U.S. DEPARTMENT OF STATE — **Washington, DC**
Bureau of European and Eurasian Affairs, Southern Europe Office Internship — March 2016 – June 2016

- Worked with Foreign Service Officers on Economic Portfolio of Turkey, Greece, and Cyprus including international trade promotion, Cyprus negotiations, environmental issues, and energy infrastructure development

THE WOODROW WILSON INTERNATIONAL CENTER FOR SCHOLARS — **Washington, DC**
Scholar Research Assistant Internship — Aug. 2015 – Dec. 2015

- Researched International Trade issues with a focus on the Transatlantic Trade and Investment Partnership

FREEDOM HOUSE — **Washington, DC**
Executive Office Internship — June 2015 – Aug. 2015

- Drafted memorandum and articles with the President of Freedom House on economics and human rights

CLEARANCES, LANGUAGES AND INTERESTS

Clearance and Languages: Secret (2016); German (Business Proficiency)
Interests: Kayaking; Tennis; Studied Continental Philosophy and German Literature; Film studies

Record of: Alexander Maciej Nowakowski
GUID: 818841441

Course Level: Juris Doctor

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	001	91	Civil Procedure Charles Abernathy	4.00	B+	13.32	
LAWJ	004	13	Constitutional Law I: The Federal System Susan Bloch	3.00	B	9.00	
LAWJ	005	13	Legal Practice: Writing and Analysis EunHee Han	2.00	IP	0.00	
LAWJ	008	91	Torts Girardeau Spann	4.00	B+	13.32	

	EHrs	QHrs	QPts	GPA
Current	11.00	11.00	35.64	3.24
Cumulative	11.00	11.00	35.64	3.24

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	002	12	Contracts Michael Diamond	4.00	P	0.00	
LAWJ	003	91	Criminal Justice Paul Butler	4.00	P	0.00	
LAWJ	005	13	Legal Practice: Writing and Analysis EunHee Han	4.00	P	0.00	
LAWJ	007	91	Property Michael Gottesman	4.00	P	0.00	
LAWJ	1323	50	International Law, National Security, and Human Rights Milton Regan	3.00	P	0.00	
LAWJ	611	13	Questioning Witnesses In and Out of Court Michael Williams	1.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	20.00	0.00	0.00	0.00
Annual	29.00	11.00	35.64	3.24
Cumulative	31.00	11.00	35.64	3.24

----------Continued on Next Column----------

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1067	05	English Legal History Sem James Oldham	3.00	A	12.00	
LAWJ	1085	05	Sentencing Law and Policy Mark MacDougall	2.00	A	8.00	
LAWJ	121	01	Corporations Michael Diamond	4.00	A-	14.68	
LAWJ	1491	03	Externship I Seminar (J.D. Externship Program) Alexander White		NG		
LAWJ	1491	125	~Seminar Alexander White	1.00	A	4.00	
LAWJ	1491	127	~Fieldwork 3cr Alexander White	3.00	P	0.00	
LAWJ	1654	08	The IMF and the Evolution of International Financial and Monetary Law Sean Hagan	3.00	A-	11.01	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	16.00	13.00	49.69	3.82
Cumulative	47.00	24.00	85.33	3.56

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	1191	08	Sovereign Debt and Financial Stability Seminar Anna Gelpern	2.00	A	8.00	
LAWJ	1492	17	Externship II Seminar (J.D. Externship Program) Joanne Chan		NG		
LAWJ	1492	86	~Seminar Joanne Chan	1.00	A	4.00	
LAWJ	1492	88	~Fieldwork 3cr Joanne Chan	3.00	P	0.00	
LAWJ	165	05	Evidence Paul Rothstein	4.00	P	0.00	
LAWJ	215	07	Constitutional Law II: Individual Rights and Liberties Jeffrey Shulman	4.00	A-	14.68	
LAWJ	361	01	Professional Responsibility: The American Legal Profession in the 21st Century: Tech, Markets, & Reg Tanina Rostain	2.00	A-	7.34	

	EHrs	QHrs	QPts	GPA
Current	16.00	9.00	34.02	3.78
Annual	32.00	22.00	83.71	3.81
Cumulative	63.00	33.00	119.35	3.62

----------Continued on Next Page----------

This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Alexander Maciej Nowakowski
GUID: 818841441

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Fall 2021 ----------							
LAWJ	1167	05	Anatomy of a Federal Criminal Trial: The Prosecution and Defense Perspective Jonathan Lopez	2.00	A	8.00	
LAWJ	1527	05	Habeas Corpus Post Conviction Practicum Christina Mathieson	5.00	A+	21.65	
LAWJ	196	05	Free Press Seth Berlin	2.00	A	8.00	
LAWJ	410	05	State and Local Government Law Sheila Foster	3.00	A	12.00	

	EHrs	QHrs	QPts	GPA
Current	12.00	12.00	49.65	4.14
Cumulative	75.00	45.00	169.00	3.76

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
---------- Spring 2022 ----------							
In Progress:							
LAWJ	1712	09	Advanced Evidence Seminar	2.00	In Progress		
LAWJ	1756	05	Criminal Law Theory in Context	2.00	In Progress		
LAWJ	178	05	Federal Courts and the Federal System	3.00	In Progress		
LAWJ	455	97	Federal White Collar Crime	3.00	In Progress		

---------- Transcript Totals ----------

	EHrs	QHrs	QPts	GPA
Current				
Annual	12.00	12.00	49.65	4.14
Cumulative	75.00	45.00	169.00	3.76

---------- End of Juris Doctor Record ----------

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G40653461
Date of Birth: 01-MAR

Date Issued: 16-SEP-2016

Record of: Alexander Maciej Nowakowski

Page: 1

Student Level: Undergraduate
Admit Term: Fall 2012

Issued To: Alexander M. Nowakowski
12 Kensington CT
Princeton, NJ 08550

Current College(s):Elliott Schl of Intl Affairs
Current Major(s): International Affairs
Economics
Current Minor(s): German Language & Literature
Concentration(s): International Economics
Europe and Eurasia

Degree Awarded: Bachelor of Arts 15-MAY-2016
summa cum laude
Major: International Affairs
Major: Economics
Minor: German Language & Literature
Area of Concentration: International Economics
Area of Concentration: Europe and Eurasia

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
NON-GW HISTORY:			
2011-2012	Advanced Placement Exam Credit		
GEOG 1001	Intro To Human Geography	3.00 TR	
HIST 1120	European Civ In World Context	3.00 TR	
Transfer Hrs: 6.00			
FALL 2014	Vienna Univ of Econ & Bus Adm		
ECON 2182	International Macroeconomics	2.00 TR	
ECON 3098	European Law And Economics	3.00 TR	
GER 2111	German Business Communication	3.00 TR	
IAFF 3188	Doing Business Arab World	3.00 TR	
IBUS 4900	Energy Economics	3.00 TR	
Transfer Hrs: 14.00			
Fall 2015	Rutgers University-Camden		
ECON 2123	Introduction To Econometrics	3.00 TR	
Transfer Hrs: 3.00			
Total Transfer Hrs: 23.00			
GEORGE WASHINGTON UNIVERSITY CREDIT:			
Fall 2012			
Elliott Schl of Intl Affairs			
International Affairs			
ECON 1011	Principles Of Economics	3.00 B+	9.90
FILM 2153	History Of World Cinema I	3.00 A	12.00
GER 1003	Second-Year German	4.00 A	16.00
HIST 2340	Us Diplomatic History	3.00 A	12.00
PSC 1001	Intro To Comparative Politics	3.00 A	12.00
Ehrs 16.00	GPA-Hrs 16.00	Pts 61.90	GPA 3.87
CUM 16.00	GPA-Hrs 16.00	Pts 61.90	GPA 3.87
Good Standing			
Dean's List			
********** CONTINUED ON NEXT COLUMN **********			

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Spring 2013				
Elliott Schl of Intl Affairs				
International Affairs				
ECON 1012	Principles Of Economics	3.00	A-	11.10
GER 1004	Second-Year German	4.00	A	16.00
HIST 1011	World History, 1500-Present	3.00	A	12.00
IAFF 1005	Intro-Intl Affrs:Wash Perspect	4.00	A	16.00
UW 1020	University Writing	4.00	A	16.00
Ehrs 18.00	GPA-Hrs 18.00	Pts 71.10	GPA	3.95
CUM 34.00	GPA-Hrs 34.00	Pts 133.00	GPA	3.91
Good Standing				
Dean's List				
Fall 2013				
GER 2009	Intermediate German	3.00	A	12.00
PHIL 1051	Introduction To Philosophy	3.00	A	12.00
PSC 2331	Politics Of Russia, C/E Europe	3.00	A	12.00
PSC 2482	African International Politics	3.00	A-	11.10
STAT 1111	Business & Economic Stat I	3.00	B	9.00
Ehrs 15.00	GPA-Hrs 15.00	Pts 56.10	GPA	3.74
CUM 49.00	GPA-Hrs 49.00	Pts 189.10	GPA	3.86
Good Standing				
Spring 2014				
Elliott Schl of Intl Affairs				
International Affairs				
Economics				
German Language & Literature				
International Economics				
Europe and Eurasia				
GEOG 3120	World Regional Geography	3.00	A-	11.10
GER 2010	Intermediate German	3.00	A	12.00
IAFF 2040	Gametheory&Strategicth inking	3.00	A-	11.10
MATH 1252	Calculus-Social & Mgt Sciences	3.00	B	9.00
PHIL 3152	Theory Of Knowledge	3.00	B+	9.90
Ehrs 15.00	GPA-Hrs 15.00	Pts 53.10	GPA	3.54
CUM 64.00	GPA-Hrs 64.00	Pts 242.20	GPA	3.78
Good Standing				
********** CONTINUED ON PAGE 2 **********				

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G40653461
Date of Birth: 01-MAR

Record of: Alexander Maciej Nowakowski

Date Issued: 16-SEP-2016

Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Fall 2014				
	Elliott Schl of Intl Affairs			
	International Affairs			
	International Economics			
	Europe and Eurasia			
EXCH 0006	Undergraduate Study Abroad	15.00	SB	0.00
Ehrs	0.00 GPA-Hrs 0.00 Pts	0.00 GPA		0.00
CUM	64.00 GPA-Hrs 64.00 Pts	242.20 GPA		3.78
	Good Standing			
Spring 2015				
	Elliott Schl of Intl Affairs			
	International Affairs			
	Economics			
	German Language & Literature			
	International Economics			
	Europe and Eurasia			
ECON 2121	Financial Economics	3.00	A	12.00
ECON 2181	Intl. Trade: Theory And Policy	3.00	A	12.00
GER 2162	German CultureÃ¢Â€Â"In English	3.00	A	12.00
IAFF 2190W	Turkey And Its Neighbors	3.00	A	12.00
PSC 2444	Public International Law	3.00	A	12.00
Ehrs	15.00 GPA-Hrs 15.00 Pts	60.00 GPA		4.00
CUM	79.00 GPA-Hrs 79.00 Pts	302.20 GPA		3.83
	Good Standing			
	Dean's List			
Summer 2015				
IAFF 3195	Internship	0.00	P	0.00
Ehrs	0.00 GPA-Hrs 0.00 Pts	0.00 GPA		0.00
CUM	79.00 GPA-Hrs 79.00 Pts	302.20 GPA		3.83
Fall 2015				
BISC 1005	Biology Of Nutrition & Health	3.00	A	12.00
ECON 2101	Intermed Microeconomic Theory	3.00	A	12.00
ECON 2102	Intermed Macroeconomic Theory	3.00	A-	11.10
GER 2091	Intro To German Lit-In English	3.00	A	12.00
IAFF 3195	Internship	0.00	P	0.00
Ehrs	12.00 GPA-Hrs 12.00 Pts	47.10 GPA		3.93
CUM	91.00 GPA-Hrs 91.00 Pts	349.30 GPA		3.84
	Good Standing			
	Dean's List			

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD	PTS
Spring 2016				
ECON 2136	Natural Resources/Environ Econ	3.00	A-	11.10
ECON 4198W	Proseminar In Economics	3.00	A	12.00
GER 2092	Intro To German Lit-In English	3.00	A	12.00
IAFF 3180	Globalization & Natl' Security	3.00	A	12.00
Ehrs	12.00 GPA-Hrs 12.00 Pts	47.10 GPA		3.93
CUM	103.00 GPA-Hrs 103.00 Pts	396.40 GPA		3.85
	Good Standing			
	Dean's List			

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	103.00	103.00	396.40	3.85
TOTAL NON-GW HOURS	23.00	0.00	0.00	0.00
OVERALL	126.00	103.00	396.40	3.85

########## END OF DOCUMENT ##########

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THE WORD VOID APPEARS WHEN PHOTOCOPIED
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UNIVERSITY REGISTRAR

THE LONDON SCHOOL OF ECONOMICS AND POLITICAL SCIENCE

ACADEMIC TRANSCRIPT

Name: **Alexander MacIey NOWAKOWSKI**
Date of Birth: **01 March 1994** LSE ID No: **201626112** UK Higher Education ID No: **1611370117608**

The above named was a student at the London School of Economics and Political Science and followed a programme which is 1 year in length when studied in full-time mode.

Programme: **MSc in International Political Economy**
Start Date: **22 September 2016** Completion Date: **21 September 2017**
Language of institution: **English**

Award: **MSc in International Political Economy**
Awarding Body: **London School of Economics and Political Science**
Class: **Merit** Official Date of Award: **09 November 2017**

Session	Course	Title	Level	Value	Mark	Grade
2016/7	**IR499**	**Dissertation**	**V**	**1**	**67**	**M**
2016/7	**MY4M2**	**Foundations of Social Research 2**	**V**	**1**	**59**	**P**
2016/7	**IR469**	**Politics of Money in the World Economy**	**V**	**0.5**	**72**	**DI**
2016/7	**IR455**	**Economic Diplomacy**	**V**	**0.5**	**69**	**M**
2016/7	**IR470**	**International Political Economy**	**V**	**0.5**	**67**	**M**
2016/7	**IR468**	**The Political Economy of Trade**	**V**	**0.5**	**61**	**M**

London School of Economics and Political Science

Mark Thomson
Academic Registrar

Issued and signed on: 28 November 2017

Guide to course levels and grading:

Each course has been assigned to a level of postgraduate study as follows:

Level	Explanation
IV	Diploma
V	Masters degree

The examiners for each course will determine a grade for each candidate as follows:

Level IV

Mark	Grade	Classification
70-100	DI	Distinction
60-69	M	Merit
40-59	P	Pass
0-39	F or CF	Fail or Condoned Fail
0	AB	Absent
0	I	Incomplete
-	NA	Not assessed this year

Level V

Mark	Grade	Classification
70-100	DI	Distinction
60-69	M	Merit
50-59	P	Pass
0-49	F or CF	Fail or Condoned Fail
0	AB	Absent
0	I	Incomplete
-	NA	Not assessed this year

The distribution of grades for a number of programmes prior to 2007/8 differed to the above guide. Further information is available online at: lse.ac.uk/Transcripts.

Notes:

Information about individual programmes can be found in the School's Calendars. Calendars can be accessed online at lse.ac.uk/Calendar.

Please note that the School does not calculate students' GPA average and is unable to provide related information.

This transcript is valid only when accessed electronically via the Digitary portal or when stamped and signed on behalf of the Academic Registrar and printed on LSE-headed paper. For any queries on this transcript, including to check its validity, please email registry@lse.ac.uk, attaching the student's written consent in accordance with the Data Protection Act (1998).

Last updated: October 2013

March 02, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am writing in support of the application of Alexander Nowakowski for a federal judicial clerkship following his graduation from the Georgetown University Law Center in May 2022.

My acquaintance with Alex came about through his participation in the Sentencing Law and Policy course that I teach as an adjunct professor at Georgetown. Alex was one of the most active and articulate participants in a class of thirty students. I really cannot add any color commentary to his strong record of academic success as an undergraduate, during his studies at the London School of Economics, and as a law student. Moreover, his work experiences – including with the Department of State, the Securities and Exchange Commission and a major multinational bank – reflect a seriousness of purpose that sets him apart from many of his contemporaries.

One thing that I have learned as a trial lawyer is to deliver any significant message in no more than three parts. With that lesson in mind, the following are the most important considerations that I believe make Alex a strong candidate for a federal judicial clerkship.

First, federal sentencing could be fairly characterized as one of the most arcane subject areas in criminal law – particularly for students who have yet to try their first case. Alex was consistently the most prepared student in class, which reflected an extraordinary level of diligence in his studies. Alex is a fine scholar, an articulate advocate for an always well-considered viewpoint, and will soon be an excellent lawyer in every respect.

A second consideration arises out of the pandemic and the universal use of video technology by Georgetown through the entire fall semester of 2020. One result of this unhappy time in recent history is that I have never personally met Alex or any of his classmates and most of them have never met each other. So the usual dynamics of law school teaching were lost and many students (perhaps understandably) chose to take a minimalist approach to their work in the classroom. Alex clearly recognized the need for leadership in that circumstance and distinguished himself by frequently taking on the difficult task of initiating and sometimes reviving discussions among a class of thirty disembodied students on a video screen.

Finally, I think law school drives to the surface the real personalities of students as well as teachers. If there is any truth to that notion, Alex will be an excellent colleague in all respects – for his judge, other clerks and courthouse staff alike. Inside and outside of the classroom, Alex is serious and respectful of all points of view while maintaining a fine sense of humor and a consistently pleasant disposition.

So I can recommend Alex Nowakowksi to you in the strongest terms for consideration as a judicial clerk. I will be happy to respond to any further inquiries regarding his candidacy.

Sincerely,

Mark J. MacDougall

Mark MacDougall - mmacdougall@akingump.com

March 02, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I am writing to offer my highest recommendation in support of Alex Nowakowski's application for a judicial clerkship in your chambers. Alex worked as an intern for approximately seven months under my supervision in the chambers of Judge Kiyo Matsumoto in the Eastern District of New York. During that time, he demonstrated both the legal skill and temperament that would be required of an outstanding district court law clerk.

In Judge Matsumoto's chambers, we typically assign our interns the first drafts of opinions in social security appeals and habeas cases, but Alex quickly demonstrated the ability to work on more challenging cases. My co-clerks and I asked Alex to complete first drafts that were often some of our most difficult, including:
• An opinion to resolve a motion to de-certify a class and a cross-motion to amend the complaint in an FLSA case, shortly after the Second Circuit issued a decision clarifying the meaning of "similarly situated" plaintiffs, which required a novel analysis for purposes of the opinion;
• Findings of fact in a contract dispute with a lengthy procedural history; and
• Several opinions resolving unique habeas petitions, including ones brought by counsel, or by federal defendants pursuant to 28 U.S.C. § 2255.

Alex's most impressive work may have been a draft to resolve a First Step Act motion, in which a federal defendant sought a sentence reduction on several counts of conviction. The defendant was eligible for a sentence reduction on certain of his convictions, but the Second Circuit had not yet addressed whether his other convictions were eligible. Alex performed diligent research, and identified cases on point that the parties had not cited. Alex's draft grappled with all of the issues in a thoughtful way, and he turned in a polished first draft.

Alex's excellent work resulted in our decision to invite him to continue his internship through the fall of 2020, after he was initially hired for only the summer. He was an invaluable member of Judge Matsumoto's chambers, and I believe that he would be an outstanding law clerk.

Please let me know if I can provide any further information. Until April 30, 2021 , I can be reached at (718) 613-2188 or michael_mayer@nyed.uscourts.gov. After that date, I can be reached at (330) 416-1535 or michaelmayer87@gmail.com.

Sincerely,

Michael Mayer

March 02, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 1620
New York, NY 10007-1312

Dear Judge Liman:

I write to enthusiastically recommend that you consider Alexander Nowakowski for a clerkship. I had the privilege of teaching Alex in the Habeas Corpus Post-Conviction Practicum at Georgetown University Law Center during the Fall 2021. He immediately stood out as bright, insightful, curious, and compassionate.

Last fall, the Habeas Corpus Post Conviction Practicum consisted of two parts: (1) a weekly seminar in which students were expected to participate in discussions regarding relevant issues; and (2) a four-person team project in which the team represented a real client. Alex's team represented a client who had been convicted and sentenced to life in Georgia for the murder of a prostitute. The client was black, deaf, and merely visiting the Atlanta area as a New York resident when he was arrested.

Alex drafted several thorough, well-researched memoranda of law for the case regarding trial counsel's failure to object to evidence of prior bad acts. Alex first identified the issue on his own after reviewing the trial transcript. He was so troubled by defense counsel's egregious failure to object that he led the team in investigating evidence to support a claim that defense counsel was constitutionally ineffective. The investigation included reviewing police reports and interviewing lay witnesses who provided compelling vignettes that shed light on the truth behind the situation.

In addition to the multiple legal memoranda that Alex drafted about the prior bad acts and defense counsel's ineffectiveness and the investigation, Alex also drafted an argument in support of a hypothetical case involving a petition for habeas relief in the federal courts. Each student in the class was expected to grapple with issues of procedural default and how to present a claim under the Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254. Alex's argument that the claim was not procedurally defaulted was nuanced and demonstrated a legal understanding well beyond his age and experience. It exceeded strong legal arguments we have reviewed from our experienced capital defender colleagues. Quite frankly, my co-professor and I were blown away.

The typical clerk characteristics of attention to detail and outstanding writing skills certainly apply to Alex. Alex also brings curiosity, compassion, and brilliant legal understanding. He is perfectly suited for a clerkship, and I cannot recommend him highly enough. Please feel free to contact me directly at cmathieson@habeasinstitue.org if you have any questions.

Thank you,

Christina Mathieson

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Writing Sample

The attached writing sample is an excerpted Memorandum & Order in response to a First Step Act motion for a prisoner in federal custody within the Eastern District of New York. The defendant sought a sentence reduction for his narcotics distribution conspiracy conviction, and critically, his murder in the aid of racketeering conviction. The analysis below considers the defendant's eligibility for a sentence reduction under the First Step Act. This is draft is solely my unedited work product. Judge Kiyo A. Matsumoto's chambers has granted permission for this draft to be used as a writing sample.

Legal Standard

The United States Sentencing Commission issued four reports to Congress explaining that the ratio of 100 to 1 for crack-to-powder was too high and unjustified because sentences embodying this ratio "could not achieve the Sentencing Reform Act's 'uniformity' goal of treating like offenders alike, because they could not achieve the 'proportionality' goal of treating different offenders . . . differently, and because the public had come to understand sentences embodying the 100-to-1 ratio as reflecting unjustified race based differences." *Dorsey v. United States*, 567 U.S. 260, 268 (2012) (citing *Kimbrough v. United States*, 552 U.S. 85, 97-98 (2007)). In response, Congress enacted the Fair Sentencing Act into law increasing "the drug amounts triggering mandatory minimums for crack trafficking offense from 5 grams to 28 grams in respect to the 5-year minimum and from 50 grams to 280 grams in respect to the

10-year minimum (while leaving powder at 500 grams and 5,000 grams respectively.)" *Id.* at 269.

"The First Step Act of 2018 'made retroactive the crack cocaine minimums in the Fair Sentencing Act.'" *United States v. Williams*, No. 03-CR-1334 (JPO), 2019 WL 2865226, at *2 (S.D.N.Y. July 3, 2019) (quoting *United states v. Rose*, No. 03-CR-1501, 2019 WL 2314479, at *2 (S.D.N.Y. May 24, 2019)). Section 404(b) of the First Step Act of 2018 states that "[a] court that imposed a sentence for a covered offense may, on motion of the defendant . . . impose a reduced sentence as if section 2 and 3 of the Fair Sentencing Act of 2010 . . . were in effect at the time the covered offense was committed." Pub. L. No. 115-391, § 404, 132 Stat. 5194, 5222 (2018); *see also United States v. Holloway*, 956 F.3d 660, 664 (2d Cir. 2020). A "covered offense" is defined as "a violation of a Federal criminal statute, the statutory penalties for which were modified by section 2 or 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372), that was committed before August 3, 2010." *Id.* § 404(a).

Further, "[r]elief under the First Step Act is discretionary," though "Section 404(c) places two limits on the court's resentencing power." *United States v. Simmons*, 375 F. Supp. 3d 379, 386 (E.D.N.Y. 2019). Section 404(c) states:

> LIMITATIONS.- No court shall entertain a motion made under this section to reduce a sentence if the sentence was previously imposed or previously reduced in accordance with the amendments made by sections 2 and 3 of the Fair Sentencing Act of 2010 (Public Law 111-220; 124 Stat. 2372) or if a previous motion made under this section to reduce the sentence was, after the date of enactment of this Act, denied after a complete review of the motion on the merits.

Pub. L. No. 115-391, § 404(c), 132 Stat. 5194, 5222 (2018).

In reviewing a motion for relief pursuant to the First Step Act, the court must first consider whether the defendant is eligible for a reduction in sentence and, if eligible, consider if such relief is warranted under the particular circumstances of the case "consider[ing] all the applicable factors under 18 U.S.C. § 3553(a), as well as defendant's post-sentencing conduct while in prison." *United States v. Williams*, No. 03-CR-795 (SJF), 2019 WL 3842597, at *4 (E.D.N.Y. Aug. 15, 2019) (collecting cases). "[T]he Second Circuit has cautioned that 'many defendants who are eligible for Section 404 relief may receive no substantial relief at all' [because] 'Section 404 relief is discretionary, after all, and a district judge may exercise that discretion and deny relief where appropriate.'" *United States v. Aller*, -- F. Supp. 3d --, 2020 WL 5494622 (S.D.N.Y. Sept. 11, 2020) (quoting *United States v. Johnson*, 961 F.3d at 191).

Discussion

Defendant moves for a modification of his sentence pursuant to the First Step Act regarding his conviction for engaging in narcotics distribution conspiracy, Count Forty-Seven; and murder in aid of racketeering, Count Eight. (*See generally* Mem.) The parties agree that defendant is eligible for a modification of his sentence regarding Count Forty-Seven, however the government opposes a sentence reduction regarding defendant's conviction for murder in aid of racketeering.

I. Eligibility

First, there is no question that defendant's narcotics distribution conspiracy conviction is a covered offense. The government "agrees that [defendant's] narcotics distribution conspiracy conviction is a 'covered offense' under the First Step Act . . . [b]ecause the statutory penalties for Section 841(b)(1)(A) [charged under Count Forty-Seven] were modified by Section Three of the Fair Sentencing Act . . . ." (Opp. at 5.) In finding that narcotics distribution conspiracy was a "'covered offense' within the meaning of Section 404(a)," the Second Circuit explained that "Section 2 of the Fair Sentencing Act modified the statutory penalties associated with a violation of those provisions by increasing Section 841(b)(1)(A)(iii)'s quantity threshold from 50 to 280 grams" and, "Section 2 thus modified – in the past tense – the penalties for [defendant's]

statutory offense . . . ." *United States v. Johnson*, 961 F.3d 181, 190-91 (2d Cir. 2020); *see also United States v. Martin*, 974 F.3d 124, 133 (2d Cir. 2020); *United States v. Burrell*, No. 97 CR 988-1 (RJD), 2020 WL 5014783, at *4 (E.D.N.Y. Aug. 25, 2020).

As defendant is unquestionably eligible for relief regarding his narcotics distribution conspiracy conviction, the court turns to defendant's murder in the aid of racketeering conviction. Here, the government sets forth its main challenge to defendant's First Step Act relief by stating "there is no legal or factual basis that warrants resentencing" as "[m]urder is not a covered offense." (Opp. 5.) In support, the government cites to *United States v. Barnett*, No. 90-cr-0913(LAP, No. 19-cv-0132(LAP), 2020 WL 137162, at *4-5 (S.D.N.Y. Jan. 13, 2020),[1] and *United States v. Potts*, 389 F. Supp. 3d 352, 355-56 (E.D.Pa. 2019), to state that murder in the aid of racketeering pursuant to 18 U.S.C. § 1959(a)(1) is not a "covered offense." (*Id.*) Defendant asserts, however, that *United States v. Jones*, No. 3:99-cr-264-6(VAB), 2019 WL 4933578,

[1] The *Barnett* district court states "that [defendant] is eligible for a sentence reduction on Count Three [possession with intent to distribute cocaine-base in violation of 21 U.S.C. § 841(b)(1)(C)] but is not eligible on Count One [conspiracy to distribute narcotics in violation of 21 U.S.C. § 846]" and that "any reduction of sentence would be purely academic because [defendant] remains subject to a life sentence on Count One." *Barnett*, 2020 WL 137162, at *4-5. This court does not find the reasoning of *Barnett* persuasive in light of *Johnson*'s discussion of 21 U.S.C. § 846 eligibility in rejecting the government's proposed limitations in reading the First Step Act. *Johnson*, 961 F.3d at 190 n.6.

(D. Conn. Oct. 7, 2019), and *United States v. Powell*, No.3:99-cr-264-18(VAB), 2019 WL 4889112, (D. Conn. 2019), provide for eligibility as the "individual life sentences for Racketeering and crack cocaine distribution . . . flowed from a single offense level and a single sentence guideline determination." (Mem. 16.)

In *United States v. Powell*, the defendant had been convicted of racketeering offenses, conspiracy to distribute cocaine base, obstruction of justice and witness tampering, and conspiracy to commit money laundering. 2019 WL 4889112, at *1. The *Powell* court found that because the defendant had been convicted of a "covered offense," the narcotics distribution conspiracy in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A), and 846, that the defendant was eligible for resentencing of his entire sentence because the racketeering offenses are "premised on violations of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A)." *Id.* at 5. The *Powell* court further stated that the "RICO, RICO Conspiracy, obstruction of justice and witness tampering, and conspiracy to commit money laundering convictions thus were all addressed together, with the crack cocaine violation, as part of a single sentencing package, as inextricably related offenses." *Id.* at *8. (citing *United States v. Triestman*, 178 624, 630 (2d Cir. 1999)). Under the same logic, the *Powell* court found that the defendant in *United States v. Jones*, who had been convicted

of racketeering offenses and conspiracy to distribute to heroin and cocaine base in violation, was eligible for First Step Act relief. 2019 WL 4933578, at *4-5.

One court in the Eastern District of Michigan has characterized the *Powell* court's reasoning as the "one qualifies all" approach and has rejected its conclusions because a "bedrock principle of post-conviction procedure is that 'a district court may modify a defendant's sentence only as provided by statute.'" *United States v. Smith*, No. 04-90857, 2020 WL 3790370, at *10 (E.D. Mich. July 7, 2020) (quoting *United States v. Johnson*, 564 F.3d 419, 421 (6th Cir. 2009)) (brackets omitted). "Plainly, [Section 404(b)] indicates that the Court may only impose reduced sentence for a covered offense" and "[a]t the very least, Sec.404(b) does not *expressly permit* the Court reduce a sentence for a non-covered offense" while in contravention of "well-defined limits" placed on the power of a district court to modify a sentence "*Powell* assumed the court could reduce a sentence for a covered offense because Sec.404(b) did not *expressly prohibit* such a reduction." *Id.* (emphasis in original). Therefore, the *Smith* court found that the defendant was eligible and deserving of relief for the "covered offenses," but that the "First Step Act does not allow sentence reductions for non-covered offenses, such as [defendant's] continuing criminal enterprise conviction under §

848(a)" because, *inter* alia, the First Step Act must be read in conjunction with 18 U.S.C § 3582(c)(1)(B). *Id.* at *13.

While not cited by the parties, this court finds a recent decision within the Eastern District of New York taking issue with *Smith*'s conclusion that the continuing criminal enterprise conviction ("CCE") was not a covered offense to be persuasive to the extent that it provides the appropriate approach for considering eligibility. In *United States v. Burrell*, the defendant had been convicted of engaging in a continuing criminal enterprise in violation of 21 U.S.C. § 848(a) and moved pursuant to § 404 for First Step Act relief. 2020 WL 5014783, at *1. In *Johnson*, the Second Circuit explained that "it is the statute under which a defendant was convicted, not the defendant's actual conduct, that determine whether a defendant was sentenced for a 'covered offense' within the meaning of Section 404(a)." 961 F.3d at 187. In light of the Second Circuit's decision in *Johnson*, the *Burell* court reasoned that the "'covered offense'" discussion take place entirely *at the statutory level*" and, "[i]n this respect, CCE under § 848(a) and (c) is no less incomplete, or unconsummated, in 'describing a statutory offense' (to borrow *Johnson's* vocabulary) than the conspiracy statute." *Burell*, 2020 WL 5014783, at *7. "The 'statutory offense' known as CCE *can only be* fully stated by the interaction of Section 848 (a) and, in

the language of 848(c), the 'provision' of subchapter I or II of Title 21 that the defendant is charged with having continuously violated" and "one or more additional statutes must be part of identification of the statutory offense." *Id.* (emphasis added).

Further, *Burell* criticizes *Smith*'s conclusion that the CCE offense was not a covered offense because it required additional elements for a conviction even though the *Smith* court recognized that the jury must have concluded that the defendant violated § 841(a)(1) and § 846.[2] *Id.* at *6 (citing *Smith*, 2020 WL 3790370, at *12). The *Burell* court explains that its interlocking approach recognizes both the "practical" understanding of the manner in which cases are charged while fulfilling the "eligibility-*expanding*" guidance from the Second Circuit in discussing the conviction of covered offenses at the statutory level as a rejection of the government's arguments that the court should limit relief based on "actual conduct." *Id.* at 7-8 (emphasis in original).

This solution deftly threads the needle. Rather than focusing on the underlying conduct disavowed by the Second Circuit, *Burell*'s focus on the interaction of the statutes emphasizes that the CCE conviction is incomplete without the

[2] While the *Smith* court rejects the "underlying criminal conduct" approach, it appears to have considered that the defendant's enterprise dealt in both crack and powder cocaine to distinguish its reasoning from *United States v. Hall*, No. 2:93-cr-162(1), (E.D.Va. Mar. 2, 2020), in which that defendant dealt only in crack cocaine. *Smith*, 2020 WLE 3790370, at *13.

statutes that have been modified by the Fair Sentencing Act, 21 U.S.C. 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A) and 846, and therefore any modification to these statutes' penalties modifies the CCE conviction. Therefore, unlike *Powell*'s "one qualifies all" approach, *Burell*'s interlocking approach does not require consideration of any other conviction within a "sentencing package," *Powell*, 2019 WL 4889112, at *8, and determines on the statute alone if a sentence should be considered a covered offense pursuant to Section 404.[3]

Further, this reasoning, as opposed to the *Powell* court's "one-qualifies all" approach, is in line with the Second Circuit's recent decision in *United States v. Martin*. 974 F.3d 124 (2d Cir. 2020). In deciding if a defendant could receive a benefit for a "covered offense" already served for his subsequent convictions while in prison, the Second Circuit clarified that "[t]he explicit reference to sections 2 or 3 of the Fair Sentencing Act demonstrates that the First Step Act permits a sentencing reduction *only* to the extent that section 2 or 3 of the Fair Sentencing Act would apply" meaning that the "First Step Act permits a sentencing modification only to the extent the Fair Sentencing Act would have changed the

[3] The *Burrell* court explains that "to state that relation [between CCE and the violations of a covered statutory offense] does not dispose of the objection that CCE nevertheless remains a freestanding statute with its own penalty provision and that the narcotics conspiracy is 'underlying conduct' that *Johnson* says I am not to consider." *Burrell*, 2020 WL 5014783, at *5.

defendant's 'covered offense' sentence." *Id.* at 138 (emphasis in original). "[C]ourts require specific modification authorization – either due to a change in the guidelines ranges for a sentence on a particular count of conviction, or because a statute authorizes the reduction of a sentence - for *each* term of imprisonment contained in an otherwise final judgment of conviction." *Id.* at 137 (emphasis in original). Thus, the *Burrell* approach allows for modification of a sentence that can only be fully stated by its interaction with a "covered offense," without improperly considering those non-covered offenses that are not *each* subject to "specific modification authorization." *Id.*

Defendant cites to a recent Seventh Circuit decision, *United States v. Hudson*, 967 F.3d 605 (7th Cir. 2020), that has taken the "one qualifies" all approach and made clear that a defendant is eligible for First Step Act relief for non-covered offenses if he is convicted of any covered offense. (Mem. 17.) In reading Section 404(c) of the First Step Act, the Seventh Circuit states "[i]f Congress intended the Act not to apply when a covered offense is grouped with a non-covered offense, it could have included that language."[4] *Hudson*, 967 F.3d at 610-11.

[4] The Seventh Circuit finds further support for its approach from two Fourth Circuit decisions - *United States v. Gravatt*, 953 F.3d 258, 264 (4th Cir. 2020), and *United States v. Venable*, 943 F.3d 187, 193 (4th Cir. 2019). *See Hudson*, 967 F.3d at 610.

However, the Second Circuit has emphasized that 3852(c) must be read in conjunction with the First Step Act, which allows only those sentence modifications that are *expressly permitted*. *See Holloway*, 956 F.3d at 666 ("But a First Step Act motion is based on the Act's own explicit statutory authorization, rather than on any action of the Sentencing Commission. For this reason, such a motion falls within the scope of § 3582(c)(1)(B), which provides that a 'court may modify an imposed term of imprisonment to the extent otherwise expressly permitted by statute.'"); *see also Martin*, 974 F.3d at 135-37.

Therefore, in applying the *Burrell* approach, this court does not find that it has the authority to modify defendant's murder in the aid of racketeering conviction as it can not be read as a covered offense pursuant to Section 404. 18 U.S.C. Section 1959 states:

> (a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—
>
> (1) for murder, by death or life imprisonment, or a fine under this title, or both; and for kidnapping, by imprisonment for any term of years

> or for life, or a fine under this title, or both;
> . . .

18 U.S.C. § 1959. Murder in the aid of racketeering does not require interaction with any covered offense "to be fully stated." *Burrell*, 2020 WL 5014783, at *7. While dealing in controlled substances is one of the multiple crimes that may define a racketeering activity, this predicate applies to the "enterprise that engaged in racketeering activity," e.g. the drug gang, and not the defendant convicted under the statute. 18 U.S.C. § 1959. To find that the underlying conduct of the Mora organization's dealing of crack cocaine as an interlocking component to the murder in aid of racketeering offense does not serve the purposes the Fair Sentencing Act.

In *Johnson*, the Second Circuit discussed the government's anxiety that "if Section 404 eligibility turns on whether a defendant was sentence for violating a certain type of 'Federal criminal statute,' that [it] would lead to the *improbably broad* result that any defendant sentenced for violating Section 841(a), or even the Controlled Substances Act, would be eligible, because these could be understood as 'statutes' whose penalties were modified by Section 2 and 3 of the Fair Sentencing Act." 961 F.3d at 190 n.6. The Second Circuit stated that its analysis in the present case applied to

the 21 U.S.C. § 841(b)(1)(A)(iii), implying that it would not support such a broad approach. *Id.*

Thus, for the foregoing reasons, defendant is not eligible for relief pursuant to Section 404 in respect to his murder in the aid of racketeering conviction pursuant to U.S.C. § 1959(a)(1).

Applicant Details

First Name	**Matthew**
Last Name	**Osnowitz**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**5162825634**

Applicant Education

BA/BS From	**University of Pennsylvania**
Date of BA/BS	**May 2018**
JD/LLB From	**Columbia University School of Law** **http://www.law.columbia.edu**
Date of JD/LLB	**May 12, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Environmental Law Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Environmental Law Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**

Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Recommenders

Lloyd, Ed
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Fletcher, George
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Matthew Osnowitz
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March 19, 2022

The Honorable Lewis J. Liman
United States District Court
Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, New York 10007-1312

Dear Judge Liman:

I am a third-year student and Senior Submissions Editor of the Columbia Journal of Environmental Law at Columbia Law School. I write to apply for a clerkship in your chambers following my graduation, for the next available term. As a native New Yorker, I find the prospect of beginning my legal career clerking in your chambers particularly appealing.

Since interning with Judge Paul Engelmayer over the summer of 2020, I have been focused on clerking after graduation. That experience honed my writing and research skills, and gave me insight into the innerworkings of chambers. Serving the public while developing my own skills beside expert lawyers and jurists is the highlight of my short legal career. Additionally, I spent this last year writing and editing a note, which is published in the current volume of the Columbia Journal of Environmental Law. These experiences will make me an asset to your chambers.

Enclosed please find a resume, transcript, and writing sample. Also enclosed are letters of recommendation from Professors Mark Barenberg (212-854-2260, mb15@columbia.edu) George Fletcher (212-854-2467, gpfrecht@gmail.com), and Edward Lloyd (212-854-4376, elloyd@law.columbia.edu).

Thank you for your consideration. Please do not hesitate to contact me should you need any additional information.

Respectfully,

Matthew Osnowitz

MATTHEW OSNOWITZ

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516-282-5634 • mao2178@columbia.edu

EDUCATION

Columbia Law School, New York, NY
Juris Doctor expected May 2022
Honors: Butler Fellowship
James Kent Scholar 2L; Harlan Fiske Stone Scholar 1L
Activities: *Columbia Journal of Environmental Law*, Senior Submissions Editor
Student Note: "The Value of an Endangered Species: The ESA, Injunctions, and Human Welfare" (Published in Vol. 47 of the Columbia Journal of Environmental Law)
High School Law Institute, Mock Trial Coordinator

University of Pennsylvania, Philadelphia, PA
Bachelor of Arts, *summa cum laude*, in Philosophy, Politics, and Economics, received May 2018
Honors: Phi Beta Kappa
Goldstone Award for Academic Excellence (awarded to graduating student with highest GPA in PPE major)
Thesis: "Contractualism and Meritocracy"
Activities: Penn Wharton Public Policy Initiative, Wonk Tank featured Writer and Editor

EXPERIENCE

Debevoise & Plimpton Summer 2021 (Offer Accepted)
Summer Law Clerk
Conducted research on matters in white-collar defense and employment litigation areas. Drafted documents for clients, including separation agreements and employee stock purchase plans. Assisted in pro bono environmental litigation on behalf of a non-profit.

Hon. Paul A. Engelmayer, Southern District of New York, New York, NY
Judicial Intern Summer 2020
Researched, drafted, and edited opinions in various areas of federal law including criminal, post-conviction, immigration, and corporate matters. Observed virtual courtroom proceedings and cases of interest. Reviewed and recommended final dispositions of various pretrial and post-trial motions.

Deutsche Bank, New York, NY
Analyst, Legal & Anti-Financial Crime Division Summer 2017, July 2018 – June 2019
Helped enforce firm's legal and ensured protection against financial crime. Monitored possible financial violations and liaised with consumer-protection and regulatory agencies such as the SEC, CFTC, FINRA, and NFA.

Supreme Court of the United States, Washington, D.C.
Intern, Office of the Counselor to the Chief Justice January 2017 – April 2017
Selected as one of two students from across the United States to intern in the Office of the Counselor to the Chief Justice, Jeffrey P. Minear. Assisted the Counselor and Chief Justice Roberts in their duties within and outside of the Court, including conducting background research for briefings and drafting correspondence. Attended oral arguments and circulated a daily newsletter.

INTERESTS: Tennis, cooking, historical fiction novels

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CLS TRANSCRIPT (Unofficial)

03/19/2022 18:47:39

Program: Juris Doctor

Matthew A Osnowitz

Spring 2022

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6425-1	Federal Courts	Funk, Kellen Richard	4.0	
L6229-1	Ideas of the First Amendment	Abrams, Floyd; Blasi, Vincent	4.0	
L6620-2	Journal of Environmental Law Editorial Board		1.0	
L6467-1	Military Law and the Constitution	Paradis, Michel	2.0	

Total Registered Points: 11.0

Total Earned Points: 0.0

Fall 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6241-2	Evidence	Capra, Daniel	4.0	A-
L6620-2	Journal of Environmental Law Editorial Board		1.0	CR
L8867-1	S. Law and Philosophy	Zipursky, Benjamin	3.0	A
L9274-1	S. Professional Responsibility: Becoming a Lawyer	Spinak, Jane M.	3.0	A-
L9175-1	S. Trial Practice	Heatherly, Gail	3.0	A-

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2021

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6327-1	Employment Law	Barenberg, Mark	4.0	A-
L6429-1	Federal Criminal Law	Richman, Daniel	3.0	A
L6620-1	Journal of Environmental Law		0.0	CR
L6169-1	Legislation and Regulation	Bulman-Pozen, Jessica	4.0	A
L6675-1	Major Writing Credit	Lloyd, Edward	0.0	CR
L8661-1	S. Supreme Court	Allon, Devora Whitman; Lefkowitz, Jay	2.0	A

Total Registered Points: 13.0

Total Earned Points: 13.0

Fall 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6238-1	Criminal Adjudication	Richman, Daniel	3.0	A-
L6620-1	Journal of Environmental Law		0.0	CR
L8079-1	Jurisprudence of War	Fletcher, George P.; Paradis, Michel	3.0	A
L6473-1	Labor Law	Barenberg, Mark	4.0	B+
L9698-1	S. Constitutional Ideas of the Founding Era [Minor Writing Credit - Earned]	Hamburger, Philip	2.0	A-
L6683-1	Supervised Research Paper	Lloyd, Edward	2.0	A

Total Registered Points: 14.0

Total Earned Points: 14.0

Spring 2020

Due to the COVID-19 pandemic, mandatory Credit/Fail grading was in effect for all students for the spring 2020 semester.

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6105-1	Contracts	Scott, Robert	4.0	CR
L6108-1	Criminal Law	Rakoff, Jed	3.0	CR
L6865-1	Environmental Law Moot Court	Amron, Susan; Strauss, Ilene	0.0	CR
L6177-1	Law and Contemporary Society	Moglen, Eben	3.0	CR
L6121-7	Legal Practice Workshop II	Amron, Susan	1.0	CR
L6116-2	Property	Heller, Michael A.	4.0	CR

Total Registered Points: 15.0

Total Earned Points: 15.0

January 2020

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6130-8	Legal Methods II: Legal Theory	Purdy, Jedediah S.	1.0	CR

Total Registered Points: 1.0

Total Earned Points: 1.0

Fall 2019

Course ID	Course Name	Instructor(s)	Points	Final Grade
L6101-2	Civil Procedure	Cleveland, Sarah	4.0	A
L6133-1	Constitutional Law	Ponsa-Kraus, Christina D.	4.0	B+
L6113-4	Legal Methods	Briffault, Richard	1.0	CR
L6115-23	Legal Practice Workshop I	Frankel, Kevin B.; Newman, Mariana	2.0	P
L6118-2	Torts	Merrill, Thomas W.	4.0	A-

Total Registered Points: 15.0

Total Earned Points: 15.0

Total Registered JD Program Points: 83.0

Total Earned JD Program Points: 72.0

Honors and Prizes

Academic Year	Honor / Prize	Award Class
2020-21	James Kent Scholar	2L
2019-20	Harlan Fiske Stone	1L

Pro Bono Work

Type	Hours
Mandatory	40.0

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RECORD OF MATTHEW OSNOWITZ
ID NUMBER 83423639 BIRTHDATE: 10/01/96
DATE OF ISSUE 02/21/21

RECORD OF WORK DONE

AT THE UNDERGRADUATE LEVEL

ACADEMIC PROGRAM

Admitted From: JERICHO SENIOR H S

School: ARTS & SCIENCES
Division: COLLEGE OF ARTS & SCIENCES
Degree Program: BACHELOR OF ARTS
Major: PHILOSOPHY POLITICS & ECONOMICS
Concentration: DISTRIBUTIVE JUSTICE THEME

DEGREES AWARDED

05-14-18 BACHELOR OF ARTS
SUMMA CUM LAUDE
WITH DISTINCTION IN PHILOSOPHY POLITICS & ECONOMICS

HONORS

Dean's List 2014-15 2015-16 2016-17 2017-18;PHI BETA KAPPA

UNIVERSITY OF PENNSYLVANIA COURSE WORK

Fall 2014 COLLEGE OF ARTS & SCIENCES

ECON	001	INTRO ECON MICRO	1.00	CU	A
PHIL	002	ETHICS	1.00	CU	A
PSCI	271	CLASSIC AMER CONSTIT LAW	1.00	CU	A-
WRIT	076	WRITING SEMINAR IN PSCI: DEMOCRACY IN AMERICA	1.00	CU	A

Term Statistics: 4.00 CU GPA 3.93
Cumulative: 4.00 CU GPA 3.93

Spring 2015 COLLEGE OF ARTS & SCIENCES

ECON	002	INTRO ECON MACRO	1.00	CU	A
PSCI	130	INTRO TO AMER POLITICS	1.00	CU	A
PSCI	272	AMER CON LAW II	1.00	CU	A-
PSYC	170	SOCIAL PSYCHOLOGY	1.00	CU	A+

Term Statistics: 4.00 CU GPA 3.93
Cumulative: 8.00 CU GPA 3.93

Fall 2015 COLLEGE OF ARTS & SCIENCES

ASTR	001	SURVEY OF THE UNIVERSE (Quantitative Data Analysis Course)	1.00	CU	A+
ENGL	101	STUDY OF AN AUTHOR: POE AND POPULAR CULTURE	1.00	CU	A
HIST	135	COLD WAR: GLOBAL HISTORY	1.00	CU	A
PSCI	181	MODERN POLITICAL THOUGHT	1.00	CU	A

Term Statistics: 4.00 CU GPA 4.00
Cumulative: 12.00 CU GPA 3.95

(No further entries this column)

UNIVERSITY OF PENNSYLVANIA COURSE WORK

(Continued from previous column)

Spring 2016 COLLEGE OF ARTS & SCIENCES

BIOL	015	BIOLOGY OF HUMAN DISEASE	1.00	CU	A
COML	108	GREEK & ROMAN MYTHOLOGY	1.00	CU	A
PPE	008	THE SOCIAL CONTRACT	1.00	CU	A
SOCI	120	SOCIAL STATISTICS (Quantitative Data Analysis Course)	1.00	CU	A

Term Statistics: 4.00 CU GPA 4.00
Cumulative: 16.00 CU GPA 3.96

Fall 2016 COLLEGE OF ARTS & SCIENCES

HSOC	001	EMERGENCE OF MODERN SCI	1.00	CU	A+
PHIL	376	JUSTICE	1.00	CU	A
PPE	203	BEHAVIORAL ECON & PSYCH	1.00	CU	A
PSCI	240	RELIGION & US PUBLIC POL	1.00	CU	A

Term Statistics: 4.00 CU GPA 4.00
Cumulative: 20.00 CU GPA 3.97

Spring 2017 COLLEGE OF ARTS & SCIENCES

COLL	098	Washington Semester Internship	1.00	CU	P
PSCI	330	POL&POW/POLICY MKG IN DC	2.00	CU	A
PSCI	398	PIW:COMMUNICAT.DILEMMA: The Communicator's Dilemma	1.00	CU	A
PSCI	398	Security, Humanitarianism, or Poverty Reduction: Trends and Debates	1.00	CU	A

Term Statistics: 5.00 CU GPA 4.00
Cumulative: 25.00 CU GPA 3.98

Fall 2017 COLLEGE OF ARTS & SCIENCES

PPE	140	INTRO COGNITIVE SCIENCE	1.00	CU	A
PPE	311	STRATEGIC REASONING	1.00	CU	B+
PPE	477	CAPSTONE: SOCIAL PSYCH: OBEDIENCE	1.00	CU	A+
PPE	498	DIRECTED HONORS RESEARCH: CONTRACTUALISM AND MERITOCRACY	1.00	CU	A

Term Statistics: 4.00 CU GPA 3.83
Cumulative: 29.00 CU GPA 3.95

Spring 2018 COLLEGE OF ARTS & SCIENCES

COML	124	WORLD FILM HIST '45-PRES	1.00	CU	A
PHIL	077	PHILOSOPHY OF LAW	1.00	CU	A
PPE	312	PUBLIC POLICY PROCESS	1.00	CU	A
PPE	314	PHIL OF SOCIAL SCIENCE	1.00	CU	A

Term Statistics: 4.00 CU GPA 4.00
Cumulative: 33.00 CU GPA 3.96
Equivalent Credit: 4.00 CU
Total Credit: 37.00 CU

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*** * * * * * * * * PENN EQUIVALENT CREDIT * * * * * * * * ***

Advanced Placement Credit:	BIOL 91	1.00 CU
	ECON001 WVD	0.00 CU
	ECON002 WVD	0.00 CU
	ENGL FREE	1.00 CU
	ENGL FREE	1.00 CU
	HIST 42	1.00 CU
	PSYC001 WVD	0.00 CU
Total Penn Equivalent Credit Awarded:		4.00 CU

*** * * * * * * * * * * * COMMENTS * * * * * * * * * * * ***

Award for Distinguished Research in Philosophy,Politics and Economics; Goldstone Prize for Academic Excellence in Philosophy,Politics and Economics.

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ENVIRONMENTAL LAW CLINIC
MORNINGSIDE HEIGHTS LEGAL SERVICES, INC.
COLUMBIA UNIVERSITY SCHOOL OF LAW
435 WEST 116TH STREET • NEW YORK, NY 10027

TEL: 212-854-4291 FAX: 212-854-3554
ELLOYD@LAW.COLUMBIA.EDU

Re: Matthew Osnowitz clerkship application.

Dear Judge:

I am writing to recommend Matthew Osnowitz for a clerkship in your chambers.

I have worked with Matthew as his research supervisor on his student note during the Fall 2020 semester. I helped to guide and edit his note and reviewed his drafts from an outline to a finished product.

Matthew is a dedicated and passionate student of environmental law with a very strong work ethic. He is a quick learner and is adept at promptly incorporating feedback into his work. During his work on the note, he researched and learned complex issues of environmental law. The note focused on the Endangered Species Act, the Supreme Court interpretation of that statute in *Tennessee Valley Authority v. Hill*, and how that ruling has been interpreted by lower courts. Matthew thoroughly researched precedent at the appellate and district levels, and did substantial research into statutory materials, law review articles, other secondary sources. Through this research, he identified critical issues in lower courts' interpretation of *Hill*. Additionally, he used that thorough research and a keen legal sense to point to possible statutory revisions that might help avoid erosion of the *Hill* decision.

Matthew promptly responded to my comments in order to make the note stronger. Matthew and I had numerous conversations about the note over the months that we worked together. He dove deeply into the legal history of the ESA, and targeted the note to important and specific concerns with erosion of the ESA's protections by lower courts in situations where human welfare is implicated.

In sum, Matthew is a pleasure to work with and diligently applies himself to any task set before him. He is a strong writer, a thorough researcher, and ably incorporates comments and notes into his work. I strongly recommend Matthew for a clerkship and would be happy to discuss his application further. I can be reached at 212-854-4291 or elloyd@law.columbia.edu.

Sincerely,

Edward Lloyd
Evan M. Frankel Clinical Professor of Environmental Law

March 19, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

Recommendation of Matthew Osnowitz for Clerkship

I'm delighted to give my very strong recommendation of Matthew Osnowitz for your clerkship. I'm confident he'll do a great job assisting you in your chambers.

Mr. Osnowitz is a brilliant young man, as attested by the fact that he was the highest-ranking student in his undergraduate major at Penn – the multidisciplinary Philosophy Politics & Economics Department, one of Penn's largest majors. But his top-notch academic record doesn't stop there. At Columbia Law School, he earned Harlan Fiske Stone honors, awarded based on grades alone. And he's honed his me-ticulous writing and editing craft as editor of the *Columbia Journal of Environmental Law.*

Mr. Osnowitz started on his path to a judicial clerkship last summer, when he interned for Judge Engelmayer in the Southern District of New York. His intellectual and interpersonal gifts have also been recognized by Debevoise Plimpton, for whom he's working as a summer associate this summer.

But I don't need to vouch for him via hearsay. I've seen him in action this term as a student in my Em-ployment Law course. His class contributions were terrific – always constructive and smart. He never spoke to show off his brilliance, like some law students are known to do. Rather, he wanted to advance the ball, by building on what I or other students had said, and by generously interpreting what others had said in the most positive light. In other words, his interest in legal ideas and analysis is genuine, and his way of conversing with others about those ideas and analysis is generous and open-minded. These are wonderful qualities for service as a law clerk – and for flourishing as a young lawyer and a human being.

His exam confirmed the qualities I saw in class. His answers were smoothly written, systematically argued, and sharply reasoned.

Mr. Osnowitz and I had lengthy "office hours" via zoom. I was impressed by the impact his parents' careers as prosecutors had had on his own aspirations and on his sense of what it means to be a lawyer with integrity and commitment to the profession and to the rule of law. He spoke of his parents with joy, and painted detailed pictures of their differing, unique ways of approaching their vocations. This is a young man who loves and admires his parents, and who manifestly loves the profession he's begun to master.

I was also moved by the way Mr. Osnowitz spoke of his desire to serve as a judicial clerk. He spoke with warm, genuine respect for the rule of law, for the judicial function, and for the men and women who devote themselves to public service as judges.

As you may already have gathered, Mr. Osnowitz is a warm-hearted, decent, and kind person. He is also upbeat, cheerful, and fun to talk with. I so enjoyed our zoom meetings that I had trouble ending them.

Again, I very strongly recommend Mr. Osnowitz to you. You can't go wrong by hiring him.

Sincerely,

Professor Mark Barenberg
Isador and Seville Sulzbacher Professor of Law
Columbia Law School
New York City

Mark Barenberg - barenberg@law.columbia.edu - 212-854-2260

March 19, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to recommend Matthew Osnowitz for a Clerkship.

Matthew was a student in my Jurisprudence of War course during the Fall of 2020. He was a committed student in class, and turned in a strong piece of writing at the end of the semester. I believe that Matthew's commitment to the legal material, as well as his ability to research and write at a high level make him an especially attractive candidate for a clerkship.

In class, Matthew was a constant participant in our complex discourse on military law and ethics. He came to class prepared for every lesson, and provided clear and intriguing commentary on a routine basis. His passion for the material shined through in every discussion. He has a deep desire for justice and is fascinated by the moral aspects of law. Thus, Matthew was a unique and important voice in our class, and has a deep appreciation of the law and its intricacies.

In addition to Matthew's exemplary participation in class, he also provided an outstanding piece of written work in fulfillment of the course requirements. His term paper focused on the influence of marital honor in the American military code, and its interplay with the legal principles of the liberal American system. The piece was thoroughly researched in all aspects. His writing is clear, informative, and well argued. Undoubtedly, his writing and research skills would prove an asset to your chambers.

Moreover, Matthew's background demonstrates that the skills shown our time together in class carry over to all aspects of his legal career. Matthew holds a position on the editorial board of the Columbia Journal of Environmental Law, and spent last summer interned with Judge Paul Engelmayer in the Southern District of New York. Based on the skills he demonstrated in class, it is no surprise that he has continued to develop his prodigious writing and researching abilities.

Matthew was a pleasure to have in the classroom, and has all the skills necessary to excel in a clerkship. His passion for the law and justice are obvious. Coupled with that passion are impressive legal writing and research abilities. For these reasons, I enthusiastically recommend Matthew for a Clerkship and would be happy to discuss his application further. I can be reached at (212) 854-2467 or gpfrecht@gmail.com.

Sincerely,

/s/ George P. Fletcher

MATTHEW OSNOWITZ
Columbia Law School, J.D. '22
516-282-5634
Osnowitzm@gmail.com

This writing sample is a term paper for my Supreme Court seminar. The paper is a mock opinion based on a case that is before the Supreme Court this term, *Cedar Point Nursery* v. *Hassid*. At the beginning of the semester, each student is assigned the role of a justice, and asked to prepare an opinion based on a class-wide mock oral argument. I was assigned to play the role of Justice Kavanaugh. The opinion below is how I believe Justice Kavanaugh would approach writing *Hassid* based on the briefings and my classmates' positions at oral argument.

SUPREME COURT OF THE UNITED STATES

No. 20-107

CEDAR POINT NURSERY AND FOWLER PACKING CO.,
Petitioners, *v.*
VICTORIA HASSID, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

[April 12, 2021]

JUSTICE KAVANAUGH delivered the opinion of the Court.

The struggle between union organization and employer property rights has a long and fraught history. Employees often seek organization in order to bargain with their employers collectively and thus increase their leverage. Unionization, however, does not manifest on its own. Rather, organizing efforts are often necessary in order to bring workers together who might wish to unionize. To that end, union organizers across the country seek access to employer's property in order to extol the virtues of union membership. Unsurprisingly though, employers do not always wish to accommodate outside union organizers on their property. This case deals with a California statute that mandates non-employee union organizers access to employer property. The parties before us ask us to determine whether such an access mandate constitutes an unconstitutional per se Taking under the Fifth and Fourteenth Amendments. We hold that this case does not, however, directly implicate our Takings Clause jurisprudence. Rather, this case is more focused on the question of whether the California statute grants the access right in question. We hold that it does not.

I.

The factual record before the Court is threadbare yet uncontested. Petitioner Cedar Point Nurseries is a "strawberry plant producer" located in California. App. to Pet. for Cert. ¶ 8. It employs hundreds of farm workers, including approximately 100 full time workers and 400 seasonal employees. Id. ¶ 26. Cedar Point pays for hotel accommodations for its seasonal workers. Id. ¶ 27. Cedar Point alleges that in October 2015, union organizers

from United Farm Workers ("UFW") came onto their property without permission. Id. ¶ 30. After this incident, both Cedar Point and UFW filed unfair labor practice charges with the California Agricultural Labor Relations Board ("CALRB"). Id. ¶¶ 34 – 35; Brief for Respondents 10.

The CALRB dismissed both charges. In February 2016, Petitioners filed a complaint in the Eastern District of California for declaratory and injunctive relief under 42 U.S.C. § 1983 against the Board. See *Cedar Point Nursery* v. *Gould*, No. 1:16-CV00185-LJO-BAM, 2016 WL 1559271 (E.D. Cal. Apr. 18, 2016). They argued, *inter alia*, that the access regulation was a taking of property without due process of law in violation of the 5th and 14th Amendments. Pet. Br. 12. The core of the argument was that the access regulation grants non-employee union organizers with an easement on Cedar Point's property. Without just compensation, an easement without consent constitutes a taking within the meaning of the Fifth Amendment, as incorporated by the Fourteenth Amendment's due process clause. See *Chicago Burlington and Quincy R.R.* v. *City of Chicago,* 166 U.S. 226, 231 (1897); *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 415 (1922). The District Court, however, dismissed this claim on grounds that the Petitioner's per se takings argument did not square with this Court's holding in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987). See *Cedar Point Nursery* v. *Gould*, No. 116CV00185LJOBAM, 2016 WL 1559271, at *5 (E.D. Cal. Apr. 18, 2016).

The Ninth Circuit affirmed. A panel held the access regulation did not constitute a per se taking because there was no "permanent physical occupation" of private property. *Cedar Point Nursery* v. *Shiroma*, 923 F.3d 524, 531 (9th Cir. 2019). The Ninth Circuit reasoned that our precedent creates a "constitutional distinction between a permanent occupation and a temporary physical invasion." *Id.* (quoting *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 1982)). Because the access right does not place union organizers on private property at all times, there was no permanent physical occupation. The regulation represents a limited right of access of union organizers. It did not meet the threshold of a permanent occupation on the level of allowing all members of the public to traverse the property on a whim. See *Nollan* v. *California Coastal Commission*, 483 U.S. 825, (1987).

We granted Certiorari to consider whether the access right constitutes a taking under the Fifth and Fourteenth

Amendments. We now remand for further development of the factual record in light of this Court's precedent.

II.

The Agricultural Labor Relations Act (ALRA), went into effect on August 25, 1975. The Act provided self-organization rights to all agricultural workers within the state. See Cal. Lab. Code § 1152 (West) ("Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection"). Section 1152 is identical to the National Labor Relations Act's (NLRA) § 7. See 29 U.S.C. § 157. The NLRA, however, excludes agricultural workers from its coverage. See 29 U.S.C. § 152 (3). The ALRA was passed in order to ensure that California agricultural workers were granted the same organizational rights as employees under the NLRA. Similar to the NLRA's goal of achieving peace in industrial labor relations, the ALRA's stated purpose is to ensure peace and fairness in agricultural labor. Compare 29 U.S.C. § 157 ("protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest") with Cal. Lab. Code § 1140.2 (West) *(*"[i]t is hereby stated to be the policy of the State of California to encourage and protect the right of agricultural employees to full freedom of association, self-organization, and designation of representatives of their own choosing").[1] Thus, the ALRA's language and purpose is to extend the rights of the NLRA to California state agricultural workers.

Neither the NLRA, nor the ALRA by its own terms grant non-employee organizers the right to access an employer's property. Rather, the right to access, if it exists at all[2] derives

[1] The statutes are similar in myriad other ways. Both laws create a regulatory board given investigatory and interpretive powers, both operate by making it an "unfair labor practice" to violate any of the rights granted to employees, and each implements similar remedies for violations. Compare Cal. Lab. Code § 1140 *et seq*. with 29 U.S.C. § 157 *et seq*.

[2] As will be discussed, our precedent in *NLRB* v. *Babcock & Wilcox Co*. 351 U.S. 105 (1956), makes it clear that a right of access within the NLRA only exists in situations "[w]hen alternative channels of effective communication are not available to a union." 351 U.S. 105, 112.

from the organizational rights granted by Sections 7 and 1152 respectively. In the ALRA's case, its statutory board, the California Agricultural Labor Relations Board (CALRB), promulgated an implementing regulation that creates a limited access right for union organizers. See Cal. Admin. Code, tit. 8, pt. II, ch. 9, §§ 20900—20901. Alluding to this Court's ruling in *NLRB* v. *Babcock & Wilcox Co*. 351 U.S. 105 (1956), the CALRB asserted "organizational rights are not viable in a vacuum. Their effectiveness depends in some measure on the ability of employees to learn the advantages and disadvantages of organization from others." *Id*.; see also *NLRB* v. *Babcock & Wilcox Co*. 351 U.S. 105, 113 (1956) ("The right of self-organization depends in some measure on the ability of employees to learn the advantages of self- organization from others.") Additionally, because "[g]enerally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication," organizer access is necessary to vindicate the rights granted by the ALRA. Cal. Admin. Code, tit. 8, pt. II, ch. 9, §§ 220900—2090. Thus, the CALRB's implementing regulation allows access "for no more than four (4) thirty day periods in any calendar year . . . when the labor organization files in the appropriate regional office." *Id.*

A.

Petitioners argue that this implementing regulation represents an easement in gross under California law. See generally, Pet. Br. Such an easement, according to petitioners, represents a "permanent physical occupation" and is a per se taking under our precedent in *Loretto*. Respondents, however, assert that there is no physical occupation, and thus no per se taking. They would have this Court analyze the regulation under our regulatory Takings analysis in *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978). See Brief for Respondents at 11. We decline to analyze the regulation under either of these standards.

It has long been a principle of this Court to avoid deciding thorny constitutional questions when a case may be resolved on other grounds. *See Rice* v. *Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S. Ct. 614, 99 L. Ed. 897 (1955) ("Court has duty to avoid decision of constitutional issues unless avoidance

becomes evasion.") Petitioners, however, ask us to graft a novel and unnecessary constitutional rule into our understanding of the Fifth and Fourteenth Amendments. This area of our jurisprudence is already fraught with difficulties, and general rules have given way to case specific analyses. See, *e.g.*, *Murr* v. *Wisconsin*, 137 S. Ct. 1933, 1937, (2017) ("This area of the law is characterized by 'ad hoc, factual inquiries, designed to allow careful examination and weighing of all the relevant circumstances."); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104 (1978); *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987); *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency,* 535 U.S. 302, 322 (2002). To create a broad, novel rule based on a state regulation with little factual record would contravene the spirit of our jurisprudence in this area.

Alternatively, analysis of this case under the *Penn Central* factors would dislodge this Court's extensive labor law jurisprudence in this area. Application of the *Penn Central* regulatory takings test would silently recognize that the regulation in question *may* constitute a violative taking under such principles. In that recognition, however, we would give all employers a nod to challenge similar access, whether granted by the NLRA or similar statutes at the state level.[3] Moreover, the case before us does not cry out for an overly broad rule. While other states have labor relations statutes, California's access regulation is unique in its broad scope. By focusing on our clear labor law precedent and the access regulation, then, we can avoid causing unforeseen difficulties for employees, employers, and union organizers. This is especially true because the access regulation violates this Court's clear labor law precedent.

III.

Over six decades ago, this Court announced the principle balancing an employer's property right and employees' Section 7 organizational rights under the NLRA. "Accommodation between

[3] California's Agricultural Labor Relations Act is unique among the many states in its specific protection of agricultural workers. Many states, however, maintain labor relations statutes and implementing regulations that may provide similar access as ALRA. *See e.g.*, New Jersey Employer–Employee Relations Act, N.J. Stat. Ann. § 34:13A–5.3; Montana Public Employees' Collective Bargaining Act Mon. Code Anno. 2019 tit. 39 ch. 31.

the two must be obtained with as little destruction of one as is consistent with the maintenance of the other." *NLRB* v. *Babcock & Wilcox Co*., 351 U.S. 105, 112, (1956). In *Babcock*, the Court had to decide whether it was an unfair labor practice in violation of Section 7 to bar non-employee union organizers from company land. The union argued that petitioning in the parking lot in front of the plant was the most practicable way of apprising employees of their organizational rights. *Id*. at 107–08. The NLRB agreed. *Babcock & Wilcox Co. (Paris, Tex.)*, 109 NLRB 485, 494 (1954) ("effective organization requires the use of printed literature and of application and membership cards, and these modes of communication are also protected by the Act . . . It is no answer to suggest that other means of disseminating Union literature are not foreclosed." (internal citations omitted.)) The Court of Appeals for the Fifth Circuit, however, rejected the Board's approach. *NLRB* v. *Babcock & Wilcox Co.,* 222 F.2d 316 (1955).

A unanimous Court affirmed the Fifth Circuit and rejected the Board's approach. Because the union organizers were not employees, Section 7's protection of organization rights did not apply *to them*. Rather, the union organizers' rights are derivative of the employees' statutory rights. As the Court explained, "[t]heir access to company property is governed by a different consideration. The right of self-organization depends in some measure on the ability of employees to learn the advantages of self–organization from others." *Babcock*, 351 U.S. at 113. Accordingly, the Court limited the right of access to non-employee workers to only those situations where "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them." *Id*. Thus, Section 7 grants a qualified access right for organizers in the case of "inaccessibility."[4] *Id*. at 112.

This distinction between employees and union organizers makes good sense, and has been reaffirmed by this Court in the intervening years. Recently, in *Lechmere, Inc.* v. *N.L.R.B.*, 502 U.S. 527 (1992) we defended and further explained our holding in *Babcock*. There, union organizers placed handbills under car windshields in a parking lot owned by employer Lechmere and several other businesses. *Id*. at 529. By that time, the NLRB had

[4] The Court finished its analysis by determining that "other means [were] readily available" for the union organizers to publish their message to Babcock's employees. *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 114 (1956). Therefore, it was not an unfair labor practice for Babcock to bar access to its land from the organizers.

articulated a novel interpretation of our holding in *Babcock*. It devised a three-factor balancing test when considering access cases: "[1] the degree of impairment of the Section 7 right if access should be denied, as it balances against [2] the degree of impairment of the private property right if access should be granted. We view the consideration of [3] the availability of reasonably effective alternative means as especially significant in this balancing process." *Jean Country*, 291 NLRB 11, 14 (1988). The question before the Court, then, was whether this balancing approach made sense of our precedent.

The Court held that such a balancing test did not comport with our understanding of the NLRA. In no uncertain terms we held: "*Babcock's* teaching is straightforward: § 7 simply does not protect nonemployee union organizers *except* in the rare case where 'the inaccessibility of employees makes ineffective the reasonable attempts by nonemployees to communicate with them through the usual channels.'" *Lechmere*, 502 U.S. at 537 (quoting *Babcock*, 351 U.S. at 112.) The NLRB was operating on an interpretation of another labor law case taken up by this Court, *Hudgens* v. *NLRB* 424 U.S. 507 (1976). The Board believed that *Hudgens* modified *Babcock* by creating a broad spectrum of property right invasions that might be justified under the NLRA. *Lechmere*, 502 U.S. at 538 ("the Board concluded that it was appropriate to approach every case by balancing § 7 rights against property rights, with alternative means of access thrown in as nothing more than an "especially significant" consideration.") On the contrary, we held that "*Hudgens* did not purport to modify *Babcock,* much less to alter it fundamentally in the way *Jean Country* suggests." *Id.* Rather, we held that *Babcock* created a general rule "that an employer may validly post his property against nonemployee distribution of union literature." *Id.* (quoting *Babcock*, 351 U.S. at 112). *Lechmere* thus made clear that *Babcock's* general rules remain good law.

The crucial question for non-union organizer access, then, is "whether the facts . . . justify application of *Babcock's* inaccessibility exception." *Lechmere*, 502 U.S. at 527. The Court further clarified that the exception is "a narrow one." *Id.* It applies only where "the *location of a plant and the living quarters of the employees* place the employees *beyond the reach* of reasonable union efforts to communicate with them." *Babcock*, *supra*, 351 U.S. at 112. In fact, if employees do not reside on the employer's property, the presumption is that they are not "beyond the reach" of union organizers. *Lechmere*, 502 U.S. at 540 (quoting *Babcock*,

351 U.S. at 113). Thus, *Lechmere* makes clear that Section 7 of the NLRA only allows for non-employee union access in cases where employees are reasonably beyond the reach of organizers.

A.

This precedent clearly answers the question at hand. Section 7 and Section 1152 of ALRA use identical language. There is no reason why ALRA ought to be interpreted any differently than our access right precedent under NLRA Section 7. In fact, when the California Supreme Court first considered a challenge to the access regulation, it held "[i]n the present context we construe those sections to *guarantee no greater rights to California property owners than do their federal counterparts*." *Pandol & Sons* v. *Superior Court*, 16 Cal. 3d 392, 409 (1976) (emphasis added). Moreover, Section 1148 of the ALRA states "[t]he board shall follow applicable precedents of the National Labor Relations Act, as amended." Cal. Lab. Code § 1148 (West). The only question we need answer today then is whether CALRB went afield of the ALRA and *Babcock* when it interpreted that statute to necessitate an access right for union organizers on all agricultural employer's property. We hold that it did.

B.

The CALRB undoubtedly understood our precedent in *Babcock* when it issued the access regulation. In the rule, the CALRB found first that "[g]enerally, unions seeking to organize agricultural employees do not have available alternative channels of effective communication." Cal. Admin. Code, tit. 8, pt. II, ch. 9, § 20900. The upshot of this finding was to justify the following access regulation. In essence, then, the CALRB issued a blanket *Babcock* exception to the entire agricultural industry in California. Union organizers did not have reasonable access to any agricultural workers in the state. Therefore, the CALRB was justified in finding that a right of access applied against all agricultural employers.

The question for the Court then is whether this blanket exception comports with our holdings in *Babcock* and *Lechmere*. This issue, however, is not novel. Rather, this was the same question the California Supreme Court considered in *Pandol & Sons*. See 16 Cal. 3d 392, 40 (1976) ("The only remaining question in this regard is whether it is Constitutionally required that the

determination of employee inaccessibility within the meaning of the Babcock & Wilcox test be made on a case-by-case basis, as the real parties urge, rather than by a rule of general application." There, the California Court asserted that "the question was not presented in either *Babcock & Wilcox* or *Central Hardware*, and the opinions are therefore silent on the point." *Id.* Thus, the California Court operated on the premise that a blanket exemption under *Babcock* was not at odds with our precedent, as that case did not call the issue either way.

The *Pandol & Sons* Court went on then to apply a more general "compelling interest" test in order to determine if the regulation violated the Fourteenth Amendment's Due Process Clause. *Id.* It looked to this Court's opinions in *Shapiro* v. *Thompson* (1969) 394 U.S. 618, 638 and *Cleveland Board of Education* v. *LaFleur* (1974) 414 U.S. 632, 640—644 for the proposition that where a "statute or regulation impairs a fundamental personal liberty, the state has the burden of showing that the measure is necessary to promote a compelling governmental interest and that there are no reasonable alternative means of accomplishing that goal." *Pandol & Sons*, 16 Cal. 3d 392, 410 (1976). The California Court then analyzed whether or not this regulation violated that rule. It determined first that the regulation had a reasonable relation to the public goal of ensuring organizational rights and labor peace for workers. *Id*. at 410–11. Those goals, moreover, received legitimation from *Babcock*, for we determined that employee rights depend to some degree on learning of those rights through union organizers. Thus, the California Court held that the regulation did not on its face infringe on Constitutional Due Process.

Next, the California Court considered an objection from respondents that the regulation was unconstitutional as applied. Specifically, respondents contended that the broad nature of the regulation was impermissible as there may be cases where an access right is granted even though an alternative means for publication to employees existed. *Id.* In fact, the CALRB recognized that these situations "[are] inevitable." *Id.* That fact however, did not convince the California Court the statute was unconstitutional. Rather, it determined that because the statute was focused on economics and social welfare, overbroad policies were permissible despite some inequality. *Id.* (citing *Dandridge* v. *Williams* (1970) 397 U.S. 471, 485.) Thus, the California Court concluded that the regulation as applied neither offended our

precedent in *Babcock* nor infringed on Constitutional Due Process.

After considering that objection, the California Court turned its attention to whether the regulation was a permissible exercise of the ALRA's authority. It first found that because Section 1152 of ALRA and Section 7 of the NLRA use identical language, the scope of the state statute is identical to the federal law. *Id.* at 413 ("When legislation has been judicially construed and a subsequent statute on the same or an analogous subject is framed in the identical language, it will ordinarily be presumed that the Legislature intended that the language as used in the later enactment would be given a like interpretation. This rule is applicable to state statutes which are patterned after federal statutes.'" (quoting *Los Angeles Met. Transit Authority* v. *Brotherhood of Railroad Trainmen* 54 Cal.2d 684, 688—689 (1960)).

Finally, the Court determined that Section 1148 made the *Babcock* precedent applicable to understanding the ALRA. *Id.* However, it asserted once again that *Babcock* did not answer the question of whether a blanket exemption is a permissible exercise of statutory authority. *Id.* at 414 ("[A]s we observed above, the question whether such a right of access should be resolved by regulation or by adjudication was not presented in either decision, and the opinions are accordingly silent on the matter.") Additionally, the CALRB had sufficiently weighed the evidence of union organizer access to agricultural worker to determine that they were all inaccessible. *Id.* at 414–15. California agricultural workers "did not arrive and depart every day on fixed schedules, there were no adjacent public areas where the employees congregated or through which they regularly passed, and the employees could not effectively be reached at permanent addresses or telephone numbers in the nearby community, or by media advertising." *Id.* These findings led the California Court to hold the CALRB was within its statutory authority in determining that union organizers lacked a reasonable alternative means to access agricultural employees other than encroaching on their land. *Id.*

C.

The California Court misinterpreted this Court's holding in *Babcock* as has been made explicit by *Lechmere*. While we do not disturb the California Court's holdings with regard to

Constitutional due process, we do find that the access regulation is contrary to our precedent.

First, the California Court erred in its determination that *Babcock* did not address the question of whether such a general regulatory exemption could be permissible. When this Court applied the law in *Babcock*, it looked at numerous specific facts in order to determine whether the exception was met. ("The plants are close to small well-settled communities where a large percentage of the employees live. The usual methods of imparting information are available. The various instruments of publicity are at hand. Though the quarters of the employees are scattered they are in reasonable reach." (internal citations omitted)). Now, this reasoning is not explicit in rejecting a general rule against an exemption, but at the very least, points in the direction of a fact-specific inquiry. What it was not was "silent."

Moreover, in the years after both *Pandol & Sons* and *Babcock*, this Court has clarified its position regarding access rights in the labor context. While it is arguable that *Babcock* did not touch the broad exemption question, our holding in *Lechmere* provides a more explicit answer. As stated above, *Lechmere* reiterates that the *Babcock* exemption is narrow, and only to be used in situations where union organizers have no reasonable access to employees. See *Lechmere*, *supra,* 502 U.S. at 537. We believe that it is the "rare" case where non-employee union organizers have a statutory right to use an employer's property against his will. *Id.* Furthermore, in *Lechmere* we once again looked at "whether the *facts here* justify application of *Babcock's* inaccessibility exception." *Id.* (emphasis added). The Court was sure to base its ruling on facts specific to the case. Thus, our precedent demonstrates that whether an access right exists is tailored to the specific facts of disputes as they arise.

We find now that these cases therefore answer the question posed in *Pandol & Sons*. The access regulation promulgated by the CALRB was outside of ALRA's statutory authority, because the *Babcock* exemption *only* operates on a case by case basis. A state regulation cannot use a set of magic words to contravene the precedent of this Court. We believe that the CALRB did just that when it promulgated this regulation, and as such, the action was outside of the scope of the authorizing statute.

Additionally, the result in this case is compelled by two further considerations. First, the overarching principle of our precedent is that accommodation between an employee's right to information about unions must be obtained with as little

destruction of the employer's property right as is consistent with its maintenance. See *Babcock*, *supra*, 351 U.S. at 112. CALRB's access regulation is the antithesis of this principle. As the Board admitted, it will cover cases where employees *can* be reasonably accessed. See *Pandol & Sons*, 16 Cal. 3d 392 at 410 ("This is inevitable, as the board candidly recognizes.") All across California then, the access regulation is infringing on the property rights of employers unnecessarily. This is not the balance the Court intended. It is overkill.

Second, if we were to find that the CALRB was acting within its statutory authority, what would stop the NLRB from declaring that other areas of labor relations are the same? For instance, the NLRB could use general evidence to find that entire sectors at a time satisfied the *Babcock* exemption. Soon enough, we could be dealing with a federal statute that requires employers to allow union organizers on their property nationwide. Such a situation is inconsistent with our precedent, and the scope of rights granted by Section 7 of the NLRA and by extension Section 1152 of the ALRA. In sum, the consequences of allowing such a broad exemption based on generalized evidentiary findings would jeopardize the delicate balance of labor relations we have preserved over the last eight decades. Thus, the principles of our precedent compel this result, and the grave implications of going the other way militate against such a holding.

IV.

Both parties before the Court argue that the CALRB's access regulation ought to be analyzed as a possible deprivation of property in violation of the Fifth and Fourteenth Amendments. For the reasons outlined above, we decline to reach that question because the access regulation is outside the scope of the ALRA. The parties, however, approached this case as a possible Taking because the regulation gives union organizers a state mandate to use employer's property. Those arguments go a step too far. They ignore this Court's substantial labor law precedent in this area, and for the reasons set forth below, underestimate what it would mean to apply a Takings analysis to this case.

If the Court were to apply its regulatory Takings analysis under *Penn Central* or its per se analysis under *Loretto* we would eviscerate our precedent as well as the delicate balance of labor relations. In many ways, labor rights occupy a special place in this Court's precedent. For instance, in *Loretto*, the Court rejected

respondent's reliance on our decisions in the labor law context to argue that its physical intrusion into petitioner's property was not a taking. See *Loretto* 458 U.S. at 434 n.11 (1982) ("Teleprompter's reliance on labor cases requiring companies to permit access to union organizers, see, *e.g., Hudgens* v. *NLRB*, 424 U.S. 507, 96 S.Ct. 1029, 47 L.Ed.2d 196 (1976); *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 92 S.Ct. 2238, 33 L.Ed.2d 122 (1972); *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), is similarly misplaced.") "In short, the principle of accommodation announced in *Babcock* is limited to labor organization campaigns, and the 'yielding' of property rights it may require is both temporary and limited." *Id.* (citing *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 92 S.Ct. 2238, 2242). The Court pointed to the limited nature of Section 7's access right, and its purpose in ensuring vindication of employees' right to organization as reasons for the distinction. *Id.* Thus, our precedent shows that statutory labor rights occupy a distinct sphere in the Court's understanding of property rights.

We do not seek to disturb our precedent on this issue today. A Takings analysis under either test would create a multitude of jurisprudential issues moving forward. If we were to simply apply per se or regulatory Takings analysis here, our careful labor precedent would no longer stand on firm ground. Given the identical nature of the statutes, we would have to apply similar reasoning to the NLRA. Instead of striking what we believe to be the proper balance between employer property rights and employee organizational rights, we would have to morph together some new standard from our existing Takings jurisprudence and our labor law precedent. We would thus create a jurisprudential Frankenstein, turning an already fraught area into an unworkable standard. It would require the Court to determine such intransigent questions as the economic impact of having union organizers publish their views on employer property, and in a way, the value of organized labor itself.

Moreover, none of the myriad tests used in our Takings analysis are on their own sufficient to take account of the employee's interests in exercising their own rights to organization. Those interests take us far afield from the typical Takings situation where the government usurps a property holder's right for the interest of the public. The labor context injects a complex set of overlapping interests on behalf of: the government, the employer as an employer, the employer as a property holder, the union as a vindicator of employees' rights,

and the employees themselves. As it stands, our Takings jurisprudence is not the right avenue for an accounting of such concerns. Rather, we believe that our holdings in *Babcock* and *Lechmere* already set out the proper balancing of these issues under the ALRA.

A.

The Ninth Circuit thus erred when it disregarded both *Babcock* and *Lechmere* in the proceeding below. It was too quick to analyze the potential Takings challenge under a per se or regulatory test without first determining whether the CALRB's access regulation was in line with our precedent. It made this decision based on a misunderstanding of those two crucial cases. Over objection by Judge Leavy in dissent, the majority held *Babcock* did not control for two reasons. *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 534 (9th Cir. 2019). We find for the following reasons that these two arguments missed the mark that our precedent sets.

First, the Ninth Circuit pointed out that the challenged regulation in this case was made with authority pursuant to the ALRA, not the NLRA. *Id.* The NLRA, "'does not apply to "any individual employed as an agricultural laborer."' *Id.* (quoting 29 U.S.C. § 152(3)). Thus, NLRA precedent should not apply. *Id.* The problem with that reasoning, however, is that the ALRA states that "[t]he board shall follow applicable precedents of the National Labor Relations Act, as amended." Cal. Lab. Code § 1148 (West). Furthermore, as explained above, the California Supreme Court held in *Pandol & Sons* that "we construe those sections to *guarantee no greater rights to California property owners than do their federal counterparts*." *Pandol & Sons*, 16 Cal. 3d at 409 (1976). Therefore, both the plain language of the statue, and California state precedent mandate that the terms of the ALRA are to be considered based on this Courts' NLRA precedent. Our full canon thus directly bears on this case.

Second, the Ninth Circuit majority held that *Babcock* and *Lechmere* do not control because Cedar Point's argument was based on a per se Takings theory. See *Cedar Point Nursery v. Shiroma*, 923 F.3d 524, 534 (9th Cir. 2019) ("And while *Babcock* may be helpful in analyzing challenges to the access regulation under the ALRA, it is not relevant to the Growers' contention that the access regulation is a physical per se taking in violation of the Fifth Amendment.") That argument,

however, gets the analysis backward. Even though Cedar Point presents a per se Takings claim, this Court has consistently held that employer's property rights in the labor context do not operate on either per se or regulatory Takings principles. See *infra* at 13.

Moreover, Cedar Point's argument is not novel. It was even brought before this Court in *Babcock*. See Brief for Respondent at 21–22, *Babcock*, 351 U.S. 105 (1956) ("Respondent further contends that the enforcement of the Board's order would result in the taking of its property in violation of the Fifth Amendment.") The Ninth Circuit's mistake was assuming the *Babcock* Court did not bear on this question in announcing its "accommodation" principle. See *infra* at 5–6. Quite the opposite. That principle, and its corollary reasonable alternatives of communication test, *is* the property rights analysis under the NLRA. And, because the ALRA is identical and operates on our precedent, it is the proper test here as well. Thus, not only is *Babcock* "helpful" in answering the question presented by Cedar Point, it directly answers the challenge.

Judge Leavy recognized the importance of this precedent in his dissenting opinion in the proceeding below. *Shiroma*, *supra,* 923 F.3d at 534 ("The dissent contends that our analysis should be guided by *NLRB* v. *Babcock & Wilcox*, 351 U.S. 105, 76 S.Ct. 679, 100 L.Ed. 975 (1956), and its progeny.") The question for Judge Leavy was not whether the access regulation satisfied a per se Takings rule, but rather whether "defendants [could]. . . show 'unique obstacles' that frustrate their reasonable access to the Growers' employees." *Id.* at 539 (Leavy, J., dissenting). The majority noted the objection, and responded that the CALRB and *Pandol & Sons* Court found, generally, that agricultural workers operate under different circumstances than typical NLRA workers and thus are not reasonably accessible to union organizers. *Id.* at 534 n.9. For the reasons above, however, we hold that such a general finding is inconsistent with our holdings in *Babcock* and *Lechmere*. We therefore adopt the reasoning given in Judge Leavy's dissent. *Id.*

* * *

The access regulation proclaims that agricultural workers are generally isolated and so fulfill the basic contours of our exception in *Babcock*. Such a promulgation misunderstands the narrow nature of the exception, and was thus insufficient to grant access to all agricultural employer's property. The exception rests

on a case by case basis. And so, the question that need be answered is whether the Cedar Point workers can meet their heavy burden of proving inaccessibility *in this particular case*. We note the record before us is light on the facts. The workers should have the full opportunity to thread the needle on a *Babcock* exception. We therefore vacate the judgement of Ninth Circuit, and remand for further factfinding on the question of accessibility.

It is so ordered.

Applicant Details

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Applicant Education

BA/BS From	**Benedictine University**
Date of BA/BS	**May 2018**
JD/LLB From	**Georgetown University Law Center** **https://www.nalplawschools.org/employer_profile?FormID=961**
Date of JD/LLB	**May 31, 2021**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Georgetown Journal on Poverty Law and Policy**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Paulina Piasecki
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March 30, 2022

The Honorable Lewis Liman
U.S. District Court for the Southern District of New York
Daniel Patrick Moynihan United States Courthouse
500 Pearl St., Courtroom 15C
New York, NY 10007-1312

Dear Judge Liman:

I am a first-year associate at Schulte Roth & Zabel and Georgetown Law alumna. I am writing to apply for a clerkship in your chambers for your next available term.

Like your Honor, I am an aspiring federal prosecutor. I am drawn to litigation and the unique opportunity it gives attorneys to showcase skills in oral and written advocacy. Since college, I have been intimately involved with trial advocacy. During law school, I served as co-director of the trial advocacy team and competed nationally, helping the team secure its ranking as second in the Nation. After graduating law school, I was asked to serve as a coach for the team, which I now do in my spare time. I also take pride in my legal writing, a skill that I have worked hard to build over the course of my legal education and career in writing courses, internships, and now as an associate at Schulte Roth & Zabel. In this role, I have further developed my core legal writing skills and learned about a new area of law. To that end, I believe serving as a clerk in your chambers would provide me the unique opportunity and privilege to serve the American public while gaining invaluable experience as a young lawyer.

I have enclosed my resume, my unofficial law school transcript, my undergraduate transcript, several letters of recommendation, and a writing sample for your review. Letters of recommendation are attached from the following:

Professor Randy E. Barnett
Georgetown University Law Center
202-662-9936 | rb325@law.georgetown.edu

Professor Deborah Epstein
Georgetown University Law Center
202-662-9640 | epstein@law.georgetown.edu

The Hon. Craig Iscoe
Superior Court of the District of Columbia
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Professor Susan Bloch
Georgetown University Law Center
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Please let me know if I can provide any additional information. I can be reached at (847) 687-6115 and pp652@georgetown.edu. Thank you very much for your time and consideration.

Respectfully,
Paulina Piasecki

PAULINA PIASECKI

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EDUCATION

Georgetown University Law Center | Washington, D.C.
Juris Doctor **May 2021**
GPA: 3.78/3.42
Honors: Dean's List (Fall 2020); Cognetti Family Law Endowed Scholarship; Reynolds Scholar
Awards: *Best Advocate* – 2020 National Civil Trial Competition; *Regional Champion* – 2021 National Trial Competition; *National Semi-Finalist* – 2021 National Trial Competition; *Participant* – 2021 Top Gun
Journal: *Georgetown Journal on Poverty Law and Policy*
Publications: Paulina Piasecki, *The Legal Implications of COVID-19 on the Homeless*, GJPLP BLOG (Mar. 30, 2020), https://www.law.georgetown.edu/poverty-journal/blog/the-legal-implications-of-covid-19-on-the-homeless/.
Activities: Barristers' Council: Trial Advocacy Division – *Director*; Lawcapella – *President*; Women's Legal Alliance – *Mentor*; First Generation Student Union – *Member*

Benedictine University | Lisle, IL
Bachelor of Arts, *summa cum laude*, in Political Science and English Language and Literature **May 2018**
GPA: 4.0
Honors: Procopian Award – *First in Class*; Political Science Student of the Year; 2015 & 2016 Intercollegiate Outstanding Attorney; Pi Sigma Alpha Political Science Honor Society; Sigma Tau Delta English Honor Society
Activities: Mock Trial – *Captain;* Moot Court – *Founder;* Pre-Law Society – *President*; Center for Civic Leadership
Thesis: Paulina Piasecki, The New "Key to the City?" Examining Campaign Email Correspondence in the 2016 General Presidential Election (Feb. 1, 2017) (unpublished B.A. thesis, Benedictine University).

EXPERIENCE

Schulte, Roth & Zabel, LLP | New York, NY
Associate **Oct. 2021 – Present**
- Conduct legal research for matters in the Business Reorganization and Finance Groups; assist with trial preparation for ongoing bankruptcy matters and adversary proceedings; participate in bankruptcy litigation and deal strategy meetings; draft client alerts on latest bankruptcy opinions and trends.

Summer Associate **May 2020 – July 2020**
- Observed hearings and client calls with Partners; conducted legal research and prepared memoranda on privilege, employment, and contracts issues; observed, drafted, and delivered closing argument for mock trial.

Domestic Violence Clinic | *Student Attorney* | Washington, DC **Jan. 2021 – May 2021**
- Drafted petitions and affidavits to assist clients suffering from domestic violence in obtaining civil protection orders; interviewed and counseled clients, collected evidence, developed case theories, and drafted materials to prepare for trial; conducted direct examination at ex parte temporary protection order hearing.

U.S. Dept. of Justice: Criminal Division | *Public Integrity Section Law Clerk* | Washington, DC **Aug. 2020 – Dec. 2020**
- Conducted advanced legal research and prepared memoranda on evidentiary and statutory issues for motions involving violations of RICO; conducted fact investigation to assist in filing indictment; developed comprehensive compilation of mail-in ballot election laws in anticipation of fraud in 2020 General Election.

Aequitas | *Law Clerk* | Washington, DC **Jan. 2020 – May 2020**
- Developed comprehensive statutory compilations covering various defenses to sexual assault, including intoxication and using 404(b) other acts evidence against victims; examined the legality of service of process via email and social media in light of the COVID-19 pandemic.

Marzulla Law | *Law Clerk* | Washington, DC **Sept. 2019 – May 2020**
- Prepared memoranda on contract and environmental law; assisted attorneys in preparing for depositions; conducted client interviews; reviewed and prepared trial materials to assist in ongoing litigation.

Cook County State's Attorney's Office | *Criminal Appeals Law Clerk* | Chicago, IL **May 2019 – Aug. 2019**
- Compiled, reviewed, and judiciously presented substantial amounts of evidence to construct appellate briefs; analyzed constitutional issues and engaged in statutory interpretation to develop legally sound arguments and persuasive pleadings.

LANGUAGES & INTERESTS

Language: Polish (high proficiency in reading, writing, and speaking)
Interests: Polish-American Heritage, *Harry Potter*, Broadway, Traveling, Corny Historical Fiction, Weightlifting, Golf

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GUID: 811947690

Course Level: Juris Doctor

Degrees Awarded:
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Georgetown University Law Center
Major: Law

Entering Program:
Georgetown University Law Center
Juris Doctor
Major: Law

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2018							
LAWJ	001	93	Legal Process and Society Lawrence Solum	2.50	IP	0.00	
LAWJ	002	93	Bargain, Exchange & Liability David Super	3.00	IP	0.00	
LAWJ	005	32	Legal Practice: Writing and Analysis Susan McMahon	2.00	IP	0.00	
LAWJ	007	31	Property in Time Daniel Ernst	4.00	B	12.00	
LAWJ	009	35	Legal Justice Seminar David Luban	3.00	B	9.00	

	EHrs	QHrs	QPts	GPA
Current	7.00	7.00	21.00	3.00
Cumulative	7.00	7.00	21.00	3.00

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2019							
LAWJ	001	93	Legal Process and Society Lawrence Solum	5.00	B+	16.65	
LAWJ	002	93	Bargain, Exchange and Liability Part II: Risks and Wrongs David Super	6.00	B	18.00	
LAWJ	003	93	Democracy and Coercion Allegra McLeod	4.00	B	12.00	
LAWJ	005	32	Legal Practice: Writing and Analysis Michael Cedrone	4.00	B	12.00	
LAWJ	008	93	Government Processes Jonathan Molot	4.00	B+	13.32	
LAWJ	611	13	Questioning Witnesses In and Out of Court Michael Williams	1.00	P	0.00	

	EHrs	QHrs	QPts	GPA
Current	24.00	23.00	71.97	3.13
Annual	31.00	30.00	92.97	3.10
Cumulative	31.00	30.00	92.97	3.10

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2019							
LAWJ	165	07	Evidence Gerald Fisher	4.00	B	12.00	
LAWJ	215	09	Constitutional Law II: Individual Rights and Liberties Randy Barnett	4.00	A-	14.68	
LAWJ	317	05	Negotiations Seminar Leah Kang	3.00	A-	11.01	
LAWJ	418	05	Supreme Court Seminar Susan Bloch	3.00	A	12.00	

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	EHrs	QHrs	QPts	GPA
Current	14.00	14.00	49.69	3.55
Cumulative	45.00	44.00	142.66	3.24

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2020							
LAWJ	121	09	Corporations Donald Langevoort	4.00	P	0.00	
LAWJ	1244	05	Prosecuting Sexual Violence: Applying Research to Practice Jennifer Long		NG		
LAWJ	1244	81	Prosec Sexual Viol~~Sem Jennifer Long	2.00	P	0.00	
LAWJ	1244	82	Prosec Sexual Viol~~Field Work Jennifer Long	2.00	P	0.00	
LAWJ	150	05	Employment Discrimination Jamillah Williams	3.00	P	0.00	
LAWJ	361	07	Professional Responsibility M. Jesse Carlson	2.00	P	0.00	

Mandatory P/F for Spring 2020 due to COVID19

	EHrs	QHrs	QPts	GPA
Current	13.00	0.00	0.00	0.00
Annual	27.00	14.00	49.69	3.55
Cumulative	58.00	44.00	142.66	3.24

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Fall 2020							
LAWJ	1167	05	Anatomy of a Federal Criminal Trial: The Prosecution and Defense Perspective Jonathan Lopez	2.00	A-	7.34	
LAWJ	1245	09	Trial Practice and Applied Evidence Craig Iscoe	3.00	A	12.00	
LAWJ	1491	11	Externships I Seminar (J.D. Externship Program) Michael Monteleone		NG		
LAWJ	1491	95	~Seminar Michael Monteleone	1.00	A	4.00	
LAWJ	1491	97	~Fieldwork 3cr Michael Monteleone	3.00	P	0.00	
LAWJ	355	05	Trial Practice Seminar: Working with Expert Witnesses Joseph Petrosinelli	2.00	A	8.00	
LAWJ	396	05	Securities Regulation Russell Stevenson	3.00	A-	11.01	

Dean's List Fall 2020

	EHrs	QHrs	QPts	GPA
Current	14.00	11.00	42.35	3.85
Cumulative	72.00	55.00	185.01	3.36

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This is not an official transcript. Courses which are in progress may also be included on this transcript.

Record of: Paulina Piasecki
GUID: 811947690

Subj	Crs	Sec	Title	Crd	Grd	Pts	R
Spring 2021							
LAWJ	178	05	Federal Courts and the Federal System David Vladeck	3.00	P	0.00	
LAWJ	518	06	Domestic Violence Clinic Deborah Epstein		NG		
LAWJ	518	81	~Skills Development Rachel Camp	4.00	A	16.00	
LAWJ	518	82	~Educational Commitment Rachel Camp	3.00	B+	9.99	
LAWJ	518	83	Commitment to the Lawyering Role Rachel Camp	3.00	A-	11.01	

Transcript Totals

	EHrs	QHrs	QPts	GPA
Current	13.00	10.00	37.00	3.70
Annual	27.00	21.00	79.35	3.78
Cumulative	85.00	65.00	222.01	3.42

End of Juris Doctor Record

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BENEDICTINE UNIVERSITY OFFICIAL ACADEMIC TRANSCRIPT

Undergraduate Academic Record

Benedictine University
5700 College Road
Lisle, IL 605320900
United States

Name : Piasecki,Paulina
Student ID: 2242784
SSN : ###-##-9080
ADDRESS : 1102 Waverly Drive
Lake Villa, IL 60046
United States

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Jason Lloyd Heidenfelder, Registrar

Print Date: 2022-03-10
Send To: Paulina Piasecki

Degrees Awarded

Degree: Bachelor of Arts
Confer Date: 2018-05-31
Degree Honors: Summa Cum Laude
Plan: Major in Political Science
Sub-Plan: Pre-Law Concentration
Plan: Major in English Language and Literature

Test Credits

Test Credits Applied Toward Undergraduate

Advanced Placement		English Language-Comp	4.00		
Transferred to Term 2014 Fall as					
WRIT	101	Person in Community: Writing	3.000	P	
Grading Basis:		Transfer Grading Basis			
Advanced Placement		Psychology	4.00		
Transferred to Term 2014 Fall as					
PSYC	100	Survey of Psychology	3.000	P	
Grading Basis:		Transfer Grading Basis			
Advanced Placement		World History	3.00		
Transferred to Term 2014 Fall as					
GENL	177	General Elective	3.000	P	
Grading Basis:		Transfer Grading Basis			
Advanced Placement		History - US	3.00		
Transferred to Term 2014 Fall as					
HIST	111	American History to 1865	3.000	P	
Grading Basis:		Transfer Grading Basis			
Advanced Placement		History - US	3.00		
Transferred to Term 2014 Fall as					
HIST	112	American History since 1865	3.000	P	
Grading Basis:		Transfer Grading Basis			

- - - - - Beginning of Undergraduate Semester Record - - - - -

2014 Fall

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
LITR	257	British Literature I	3.00	3.00	A	12.000
MUSI	121	Concert Band	1.00	1.00	A	4.000
PLSC	102	American Government	3.00	3.00	A	12.000
PLSC	201	State and Local Government	3.00	3.00	A	12.000
PLSC	237	Mock Trial	3.00	3.00	A	12.000
SPCH	110	Basic Speech	3.00	3.00	A	12.000
WRIT	104	Person in Community	1.00	1.00	A	4.000
TERM GPA :		4.000 TERM TOTALS :	17.00	17.00		68.000
Transfer Term GPA		Transfer Totals	15.000	15.000	0.000	0.000
Combined GPA		4.000 Comb Totals	32.000	32.000	17.000	68.000

Dean's List

2015 Spring

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
BIOL	124	Human Health and Disease	3.00	3.00	A	12.000
LITR	100	Intro to Literary Analysis	3.00	3.00	A	12.000
MATH	110	College Algebra	3.00	3.00	A	12.000
MUSI	121	Concert Band	0.00	0.00	A	
PHIL	200	Introduction to Logic	3.00	3.00	A	12.000
PLSC	105	Law and Politics	3.00	3.00	A	12.000
WRIT	102	Research Writing	3.00	3.00	A	12.000
Course Topic(s):		Social Science				
TERM GPA :		4.000 TERM TOTALS :	18.00	18.00		72.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA		4.000 Comb Totals	18.000	18.000	18.000	72.000

Deans List

BENEDICTINE UNIVERSITY OFFICIAL ACADEMIC TRANSCRIPT

Undergraduate Academic Record

Benedictine University
5700 College Road
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Name : Piasecki,Paulina
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Jason Lloyd Heidenfelder, Registrar

2015 Fall

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
IDS	201	Catholic/Benedictine Tradition	3.00	3.00	A	12.000
Course Topic(s):		Way of St. Benedict				
LITR	250	Medieval Literature	3.00	3.00	A	12.000
LITR	385	Major Authors and Genres	3.00	3.00	A	12.000
MUSI	121	Concert Band	0.00	0.00	A	
PLSC	237	Mock Trial	3.00	3.00	A	12.000
PLSC	330	US Constitutional Law I	3.00	3.00	A	12.000
PLSC	336	Women in the Law	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	18.00	18.00		72.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	18.000	18.000	18.000	72.000

Dean's List

2016 Spring

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
LITR	265	Shakespeare	3.00	3.00	A	12.000
LITR	362	Modern Literature	3.00	3.00	A	12.000
MATH	115	Business Calculus	3.00	3.00	A	12.000
PHYS	106	Astronomy	3.00	3.00	A	12.000
PLSC	215	Model United Nations	3.00	3.00	A	12.000
PLSC	331	Constitutional Law II	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	18.00	18.00		72.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	18.000	18.000	18.000	72.000

Deans List

2016 Fall

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
IDS	304	HD/CG Sustain & Global	3.00	3.00	A	12.000
Course Topic(s):		Contemporary World Issues				
LITR	255	American Literature I	3.00	3.00	A	12.000
PLSC	210	Intern'tl Relations	3.00	3.00	A	12.000
PLSC	299	Research Methods in Pol Sci	3.00	3.00	A	12.000
RELS	230	Judaism	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	15.00	15.00		60.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	15.000	15.000	15.000	60.000

Deans List

2017 Spring

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
LITR	357	The Nineteenth Century	3.00	3.00	A	12.000
LITR	381	Theories of Gender in Lit Anly	3.00	3.00	A	12.000
PLSC	391	Topics	3.00	3.00	A	12.000
PLSC	399	Thesis Research and Writing	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	12.00	12.00		48.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	12.000	12.000	12.000	48.000

Deans List

2017 Fall

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
LCOM	261	Arthur J. Schmitt Scholars I	0.00	0.00	P	
LITR	291	Topics in Literature	3.00	3.00	A	12.000
Course Topic(s):		Myth, Legend, and Fairy-Tale				
		Myth, Legend, and Fairy-Tale				
LITR	391	Advanced Topics in Literature	3.00	3.00	A	12.000
Course Topic(s):		African-American Autobiography				
LITR	399	Senior Seminar	3.00	3.00	A	12.000
PLSC	237	Mock Trial	3.00	3.00	A	12.000
PLSC	391	Topics	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	15.00	15.00		60.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	15.000	15.000	15.000	60.000

BENEDICTINE UNIVERSITY OFFICIAL ACADEMIC TRANSCRIPT

Undergraduate Academic Record

Benedictine University
5700 College Road
Lisle, IL 605320900
United States

Name : Piasecki,Paulina
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Jason Lloyd Heidenfelder, Registrar

2018 Spring

Program: Undergraduate

Course		Description	Attempted	Earned	Grade	Points
CJUS	206	Juvenile Justice	3.00	3.00	A	12.000
ECON	101	Principles of Macroeconomics	3.00	3.00	A	12.000
FNAR	204	Renaissance to Modern Art	3.00	3.00	A	12.000
LCOM	261	Arthur J. Schmitt Scholars I	0.00	0.00	P	
LITR	315	American Literary Rlsm & Natrl	3.00	3.00	A	12.000
PLSC	395	Independent Study	3.00	3.00	A	12.000
TERM GPA :	4.000	TERM TOTALS :	15.00	15.00		60.000
Transfer Term GPA		Transfer Totals	0.000	0.000	0.000	0.000
Combined GPA	4.000	Comb Totals	15.000	15.000	15.000	60.000

Deans List

Undergraduate Semester Career Totals

CUM GPA:	4.000	CUM TOTALS :	128.00	143.00		512.000
Transfer Cum GPA		Transfer Totals	15.000	15.000	0.000	0.000
Combined Cum GPA	4.000	Comb Totals	143.000	143.000	128.000	512.000

----- End of Undergraduate Academic Record -----

MAIN CAMPUS
5700 College Road, Lisle, Illinois 60532-0900
(630) 829-6000

MESA BRANCH CAMPUS
225 East Main Street, Mesa, Arizona 85201
(602) 888-5500

TRANSCRIPT EXPLANATION

Benedictine University is an independent, coeducational institution of higher learning founded by the Benedictine monks of St. Procopius Abbey. Benedictine University is accredited by The Higher Learning Commission, the Commission of Collegiate Nursing Education, The Accreditation Council for Education in Nutrition and Dietetics (ACEND) of the Academy of Nutrition and Dietetics, the Council on Education for Public Health, Illinois State Board of Education, and the Organizational Development Institute. Membership in the State Authorization Reciprocity Agreement (SARA) and is approved by the Illinois Board of Higher Education. The University was founded in 1887 as St. Procopius College. In 1971, the College was renamed Illinois Benedictine College. The College became Benedictine University in April 1996.

The Mesa branch campus at Benedictine University began academic operation in 2013. Benedictine University at Mesa is licensed by the Arizona State Board for Private Postsecondary Education and granted the Authority to Conduct Affairs in Arizona by the Arizona Corporation Commission.

The Springfield branch campus of Benedictine University was officially closed in 2018. Benedictine University is the certifying agent of academic records for Springfield College in Illinois. Students who attended Springfield College in Illinois may have records that are computer generated or manual and may reflect work taken at both institutions.

I. Credit

A. Undergraduate credit is recorded in semester hours.
B. Effective Summer 2021, all graduate credit will be recorded in semester hours except for PHDOD credit.
C. Prior to Summer 2021, graduate credit is recorded in quarter hours with the following noted exceptions:
   a. Graduate credit in HEOC, LING, INPH, BIOL, MSVDL, EXPH, NUTR, MALS, EDUC, NRHL, and MSSCP is recorded in semester hours.
   b. Effective fall 1996, IFM continuing education credit is recorded in semester hours.
   c. TIDE (EDUC) and EDCL continuing education credit prior to fall 1995 is recorded in quarter hours. Effective fall 1995, all transcripts containing course activity after that date are recorded in semester hours.

II. Grading System

The grade point average (GPA) is computed by dividing the total number of grade points by attempted hours excluding withdrawals and prior course repeat attempts.

A = Excellent	= 4 points per credit hour	F = Failure	= 0 points per credit hour	P = Pass	= No grade points
B = Good	= 3 points per credit hour	I = Incomplete	= Temporary grade	IP = In progress	= Temporary grade
C = Satisfactory	= 2 points per credit hour	IE = Incomplete Extension	= Temporary grade	AU = Audit	= No credit/grade
D = Passing (Failure for graduate students)	= 1 point per credit hour	W = Withdrawal	= Course withdrawal	X = Deferred	= Temporary grade (discontinued as of fall 2019)

III. Repetition of Courses

A. Undergraduate credit: If a course is repeated, the student will not receive additional credit hours. Only the more recent grade is computed in the grade point average. In the prior attempt, the grade will be followed by text stating, "Repeated: Excluded from GPA."
B. Graduate credit: Prior to fall 1986, if a course is repeated both grades are computed in the grade point average. Effective fall 1986, if a course is repeated, the student will not receive additional credit hours. Only the more recent grade is computed in the grade point average. In the prior attempt, the grade will be followed by text stating, "Repeated: Excluded from GPA."

IV. Student Classification

The classification of undergraduate students is determined at the beginning of each semester according to the number of semester hours completed as follows:

Freshman - Less than 30 semester hours | Sophomores - 30 to 59 semester hours | Juniors - 60 to 89 semester hours | Seniors - 90 or more semester hours

V. Transfer Credits

Transfer coursework may be awarded credit toward degree requirements in accordance with University policies. External credit and transfer credit accepted toward degree requirements are not included in a student's cumulative GPA and may be indicated on the transcript.

VI. Degree Requirements

A. Benedictine University students are required to earn 120 semester hours of credit to qualify for a baccalaureate degree and must maintain a "C" average (2.00 GPA) during their overall college career. Only courses in which a student has received a "C" or better may be applied to the major.
B. A.A. students are required to earn 62 semester hours of credit to qualify for an associate degree and must earn a "C" average (2.00 GPA)
C. M.B.A. and M.S. (M.I.S. program) students accepted prior to fall 1998 completed degree requirements with a "C" average (2.00 GPA). Students accepted for and after fall 1998 must complete degree requirements with a "B" average (3.00 GPA).
D. All graduate degree students must complete degree requirements with a "B" average (3.00 GPA).
E. During Spring 2020 all students were given the option to elect Pass/Fail grading basis. For undergraduate level courses D or better is considered Passing. For graduate level courses C or better is considered Passing. P grades satisfy all degree requirements.
F. Transfer courses taken during the Coronavirus Pandemic starting in Spring 2020, with "P," "S," or similar earned grades may be accepted as transfer credit and will fulfill equivalent minimum course requirements.

VII. Course Numbering System

Prior to fall 2019:

009-099 Development Course (Designated with the text "Developmental (No Earned Hours)"). Credit is not included in total cumulative hours earned.

100-199 Lower Division Courses	300-399 Advanced Courses	500-599 Lower Level Graduate Courses	700-799 Lower Level Doctoral Courses
200-299 Upper Division Courses	400-499 Prerequisite Graduate Courses	600-699 Upper Level Graduate Courses	800-899 Upper Level Doctoral Courses

As of fall 2019:

0009-0999 Development Course (Designated with the text "Developmental (No Earned Hours)"). Credit is not included in total cumulative hours earned.

1000-1999 Introductory and Beginning Courses	3000-3999 Advanced Intermediate Courses	5000-5999 Lower Level Graduate Courses	7000-7999 Lower Level Doctoral Courses
2000-2999 Intermediate Courses	4000-4999 Advanced Courses	6000-6999 Upper Level Graduate Courses	8000-8999 Upper Level Doctoral Courses

VIII. Family Educational Right and Privacy Act of 1974

In accordance with U.S.C. 438(6)(4)(8) (The Family Educational Rights and Privacy Act of 1974) you are hereby notified that this information is provided upon the condition that you, your agents or employees, will not permit any other party access to this record without consent of the student.

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March 22, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

This letter is in strong and enthusiastic recommendation of Paulina Piasecki to serve as a judicial law clerk. Ms. Piasecki was a student in my course in Trial Practice and Applied Evidence at Georgetown University Law Center during the Fall semester of 2020. Ms. Piasecki's performance in the course was outstanding, and I awarded her the top grade in the class. Not only does Ms. Piasecki have extraordinary oral advocacy skills but, perhaps more important for a law clerk, she has an excellent understanding of the Federal Rules of Evidence. Her questions and comments during class demonstrate that she has sharp analytic skills and thinks carefully about legal issues. For my course, Ms. Piasecki's only written work was drafting short motions and oppositions but, from this limited perspective, she also excels at legal writing and research.

Ms. Piasecki also has strong interpersonal skills that will help make her an excellent law clerk. Despite her talents, Ms. Piasecki is not at all arrogant. She is a team player who works well with others and is receptive to criticism and suggestions. She appears to be an extraordinarily hard worker. Ms. Piasecki would be an asset to any judicial chambers.

Sincerely yours,

Chambers of
Craig Iscoe

(202) 879-7835

Craig Iscoe - Craig.Iscoe@dcsc.gov - (202) 879-7835

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 21, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write in support of Paulina Piasecki's application for a clerkship position in your chambers. I became acquainted with Paulina when she was a student in my Constitutional Law II: Constitutional Rights course in the fall of 2019. This is a large class, so I do not get to know the students as well as I do in a seminar setting. But through her class participation, Paulina demonstrated an ability to distill material facts and the Court's reasoning in the cases I teach. In particular, during class discussion of R.A.V. v. City of St. Paul, 505 U.S. 377 (1992), she was able to cogently explain Justice Scalia's somewhat tricky use of the distinction between content-based and viewpoint-based restrictions of speech under the First Amendment to evaluate the hate speech ordinance in question.

In discussions with Paulina, she made clear her interest in becoming a prosecutor. Shortly after the course began, she sought me out to ask about my own experience as a criminal prosecutor in the Cook County State's Attorney's Office where she had just completed an internship. She shared with me her passion for trial lawyering, with which I could identify as I had the same passion when I was a law student. I later became aware that she has been remarkably successful in leading Georgetown Law's Trial Advocacy program, training new members, and being sent by the team to compete in the most prestigious, national trial advocacy tournaments. Paulina is a trial advocacy all-star here at Georgetown and I have no doubt Paulina is destined to be a first-rate trial attorney.

Paulina also has a passion for constitutional law. While taking my course, she was simultaneously writing her law journal note for Professor Bloch's Supreme Court Seminar. After completing my course, she sent me a copy of her note, Returning Abortion to its Originalist Roots: The Ninth Amendment Protection of Every Woman's Right to an Abortion, which she told me had been inspired by our class discussion of the 9th Amendment.

In her note, Paulina applied the Glucksberg "fundamental rights" analysis that I taught her in class to argue how an originalist Supreme Court might overturn Roe v. Wade. She then took her analysis one step further, arguing that the original meaning of the Ninth Amendment protects natural rights unenumerated in the Constitution, and these rights include a fundamental right of bodily autonomy. This, she concludes, could form an alternative constitutional basis for abortion rights. I think this note speaks well for the writing and analytic skills she will bring to a judicial clerkship.

From all my interactions with Paulina, I was able to tell that she is a sharp, rigorous, and devoted student who has a bright future ahead of her. I have no doubt that Paulina will become an exceptional litigator and would be an invaluable asset as a clerk in your chambers.

Sincerely,

Randy E. Barnett
Patrick Hotung Professor of Constitutional Law
Faculty Director, Georgetown Center for the Constitution

Randy Barnett - rb325@law.georgetown.edu - 202-662-9936

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

March 21, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I write to convey my extremely enthusiastic recommendation of Paulina Piasecki for a clerkship in your chambers. Paulina is whip-smart, deeply insightful, and goes above and beyond expectations on every assignment she receives. Together, her experience as a national mock trial champion, her time as an associate in a large law firm, and her immersive experience representing individual clients in a law school clinical program, have honed her research skills, her emotional intelligence, her standards of excellence and her deep understanding of the trial process. She will most certainly be an outstanding law clerk.

Paulina worked closely with me during the Spring 2021 semester, when she was a third-year law student enrolled in the Georgetown's Domestic Violence Clinic, which I direct. The Clinic is an intensive, 10-credit course, and Paulina represented several clients in civil protection order litigation, under my close supervision. For each of her clients, who were victims of domestic violence living in poverty in the District of Columbia, Paulina and her student co-counsel were responsible for every aspect of pretrial preparation, negotiation, and courtroom litigation. By enrolling in the Clinic, Paulina chose to stretch herself beyond the typically insular experience of most Georgetown law students; she immersed herself in the experiences and lives of clients whose circumstances were significantly different than her own.

Paulina worked hard to make powerful connections across those differences with each of her clinic clients. She shared her professional expertise in ways that enabled her clients to make the best-informed possible decisions about crucial aspects of their lives. She learned through hard-won experience how building trust through empathic listening can be an essential prerequisite for fact investigation, evidence collection, and ensuring that an initially-reluctant client is able to open up and trust the legal/judicial system. Paulina's well-developed sense of emotional intelligence, together with her consistent and rigorous planning for all eventualities, ensured that her clients were extraordinarily grateful—and fortunate—to have her as their counsel.

Paulina has a rare combination of (justified) confidence in her abilities and a non-defensive openness to constructive feedback. She came to the clinic after having achieved enviable success in several mock trial competitions; her clinic peers were uniformly intimidated by her prior expertise. But what is most effective in a mock jury trial is not necessarily what is most effective in a real-world judicial hearing; Paulina had to pivot. Her well-honed closing argument skills tended to focus on the dramatic presentation of facts; now, she needed to prioritize persuasion rooted in logic and the application of the law. Many of us find it challenging to shift from the role of recognized expert to that of beginner, but Paulina managed this transition with enormous grace and skill. Soon, she was incorporating lessons from both learning contexts, and she rapidly became as powerful a real-world litigator as she had been a mock trial advocate.

All aspects of Paulina's trial work were thorough, well-organized, strategically sophisticated, and persuasive. When she put witnesses on the stand, her intensive preparation paid off; she was free to focus intently on the witnesses' testimony and had the presence of mind and flexibility to follow up when she didn't elicit the answers she anticipated. In her first emergency hearing, she represented a client who had real difficulty articulating her story in a cohesive fashion; without a skilled lawyer, she would likely have been denied the temporary protection order she so desperately needed. Paulina had only a short window in which to prepare an efficient direct examination that would allow the judge an opportunity to follow events clearly and grasp the gravity of the situation. Paulina came through with flying colors and her efforts had a profound impact on her client's safety.

Paulina gives her absolute all in her professional life. She spent countless hours researching, drafting, and preparing oral testimony on her clients' behalf. And she is a generous colleague—she routinely attended other students' trial moots, providing insightful, useful feedback that improved the work of those around her. She was adored by her student colleagues, who gave her an award at the end of the semester. In their words: "Paulina is a skilled, eloquent, and captivating advocate, for whom the 'language of litigation' is already deeply ingrained. She speaks and holds herself with an enviable confidence that reinforces the clarity, organization, and effectiveness of her witness examinations and legal arguments. Paulina's fine-tuned trial skills reflect the fact that she does not simply consider what to say, but also how to say it; her choice of rhetoric is deliberate and powerful. Her clients will benefit from her intelligence, her warmth, and her sophisticated strategic insights."

Paulina is smart and sophisticated about the law and she is passionately committed to becoming the best professional she can be. Her intellect, well-developed research, writing, and oral advocacy skills, and enthusiastic collegiality will make her a significant asset to any judicial chambers fortunate enough to employ her.

If I can be of any further assistance, please do not hesitate to call.

Deborah Epstein - epstein@law.georgetown.edu - 2026629675

Sincerely,

Deborah Epstein
Co-Director
Georgetown University Law Center
Domestic Violence Clinic

Deborah Epstein - epstein@law.georgetown.edu - 2026629675

Georgetown Law
600 New Jersey Avenue, NW
Washington, DC 20001

April 27, 2022

The Honorable Lewis Liman
Daniel Patrick Moynihan United States Courthouse
500 Pearl Street, Room 701
New York, NY 10007-1312

Dear Judge Liman:

I am writing to recommend Paulina Piasecki as an outstanding applicant for a judicial clerkship. Paulina is one of those welcome students who make teaching a wonderful and rewarding experience.

Paulina was in my Supreme Court Seminar in the Fall of 2019. She was always well prepared and eager to participate. In the seminar, the students are required to do a number of written projects, which I will now describe. Paulina did an outstanding job on all these projects.

First, each student is assigned a cert petition for a case pending in the Supreme Court at the time and is asked to write a cert memo as if he or she is a law clerk for a Supreme Court Justice. In the memo, the student must recommend the suggested disposition of the petition. The whole seminar then votes on whether to grant or to dismiss the petition. The case assigned to Paulina was called “Integrity Staffing Solutions, Inc. v. Jesse Busk,” a Sixth Circuit case involving the interpretation of two federal statutes. Paulina wrote an excellent memo recommending that the Supreme Court grant cert and the seminar agreed. The Supreme Court denied cert, as it does with the majority of petitions it receives.

Second, I choose two cases that the Supreme Court is deciding on the merits during the Term of the Seminar. I ask the students to write bench memos for the cases and then the seminar meets and decides the cases as if they are Supreme Court Justices. The cases I chose for Paulina’s class were:

(1) Bostock v. Clayton County, Georgia which involved the question of whether discrimination based on sexual orientation constitutes discrimination” on the basis of “ sex.”

(2) Financial Oversight and Management Board for Puerto Rico v. Aurelius Investment, LLC, which raised interesting constitutional questions about the applicability of the Appointments Clause to the Financial Oversight and Management Board for Puerto Rico.

Both Paulina’s memos and her participation as a mock Supreme Court Justice were excellent.

Finally, students who take the seminar for three credits - as opposed to only two credits – are required to write a seminar paper on a topic of their choice. Paulina chose the three-credit option and wrote an excellent paper entitled “Returning Abortion to Its Original Roots: The Ninth Amendment Protection of Every Woman’s Right to an Abortion.” It was an original, passionate paper that easily earned her an “A” for the seminar.

Paulina is more than a great student. She is a passionate, confident young woman determined to use her legal skills to make the world better. She is a first -generation college graduate, first lawyer in her family, with a strong interest in history, politics, and public service. As a former law clerk myself, I am confident that Paulina will be an excellent clerk. She has the personality, ability, enthusiasm, energy and commitment to public service to be a valuable addition to any chamber. I strongly urge you to interview her. I am sure that you will be very impressed by her considerable ability, impressive enthusiasm, and warm personality.

If I can be of any further assistance, please contact me at my office (202) 662-9063, my cellphone (202) 669-5225, or my email Bloch@law.georgetown.edu.

Best Regards.

Susan Low Bloch

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The following is my final draft of a brief assigned to me by my supervisor for the Cook County State's Attorney's Office, Criminal Appeals Division. Since then, the draft has been edited stylistically. I have received permission from my supervisor at the Cook County State's Attorney's Office to use this final draft of my brief as a writing sample. Names and addresses of the parties involved have been redacted to maintain confidentiality. My supervisor ultimately edited portions of this final draft and filed it with the First District Appellate Court in Chicago, IL. For brevity I have only included a portion of the argument section of the brief.

For context, the Defendant was charged with one count of aggravated domestic battery, two counts of aggravated battery, one count of domestic battery and three counts of violation of an order of protection. At trial, the State proved Defendant entered his family's residence, in violation of a protection order, and stabbed his stepfather in the neck, back, and right arm with a shiny silver object while his stepfather was sleeping. The trial court found the State proved its case beyond a reasonable doubt with respect to aggravated battery (deadly weapon), domestic battery, in addition to all three counts related to the violation of the order of protection. Defendant filed an appeal arguing that his aggravated battery conviction must be reduced because the State failed to establish, beyond a reasonable doubt, the essential element of using "a deadly weapon" at the time of battery. Specifically, Defendant argued that the only evidence adduced to prove this element was his mother's testimony, and that such evidence was insufficient to prove that the battery was committed with a deadly weapon.

ARGUMENT

THE STATE PROVED DEFENDANT GUILTY BEYOND A REASONABLE DOUBT FOR AGGRAVATED BATTERY WITH A DEADLY WEAPON.

Defendant, [redacted], contends the evidence adduced at trial was insufficient to establish his guilt of aggravated battery with a deadly weapon, beyond a reasonable doubt. Defendant claims the evidence failed to prove "the essential element of 'deadly weapon' . . . because [the] article was described in the most ambiguous terms." (D. Br. 2). Specifically, Defendant argues the evidence does not demonstrate the "sharp object" qualified as a deadly weapon in that it was used in a manner to produce death. (D. Br. 2). Defendant's argument must fail however, because viewing the evidence in the light most favorable to the People, any rational fact finder would have found Defendant guilty beyond a reasonable doubt. Defendant's argument is nothing more than an invitation for this Court to re-weigh the evidence, and as such, this Court should reject Defendant's argument and instead affirm Defendant's conviction for aggravated battery with a deadly weapon.

Defendant was charged by information with one count of aggravated domestic battery, one count of aggravated battery with a deadly weapon, one count of aggravated battery causing great bodily harm, one count of domestic battery, and three counts of violating an order of protection in stabbing his stepfather, Mr. [redacted]. (C. 17-26). Following a bench trial, Defendant was acquitted of counts I and III, and subsequently found guilty of Counts II and V. (S.R. 222-223). Defendant was subsequently sentenced to four years imprisonment in the Illinois Department of Corrections (Count II) to run concurrently with a three-year term of imprisonment (Count V). (S.R. 222-223). Defendant now appeals the aggravated battery count with a deadly weapon, which charged that Defendant became angry-

> in committing a battery, other than by the discharge of a firearm, caused bodily harm to Mr. [redacted], to wit: stabbed Mr. [redacted] about the body with an object, and in committing the battery, [redacted] [redacted] used a deadly weapon, to wit; a sharp object.
> (C. 19).

Defendant bears a heavy burden with this challenge. Under long standing precedent, the relevant question for this Court is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *People v. Collins*, 214 Ill.2d 206, 217 (2005). Accordingly, because the standard of review does not allow a reviewing court to substitute its judgment for that of the fact finder (*People v. Sutherland*, 155 Ill.2d 1, 17 (1992)), the appellate court will not retry Defendant, and a conviction will not be reversed unless the evidence is so unreasonable, improbable or unsatisfactory that it raises a reasonable doubt of Defendant's guilt. *See People v. Evans*, 209 Ill.2d 194, 209 (2006); *People v. Hall*, 194 Ill.2d 305, 329-30 (2000). Determinations of witness credibility, the weight to be given testimony, and the reasonable inferences to be drawn from the evidence are responsibilities of the trier of fact, not the reviewing court. *See People v. Jimerson*, 127 Ill. 2d 12, 43 (1989).

It is presumed the trial court based its determination on proper legal reasoning and the court is presumed to have properly considered the evidence before it; it is Defendant's burden to affirmatively show the opposite. *See People v. Thompson*, 222 Ill.2d 1, 35 (2006); *People v. Brazziel*, 406 Ill. App. 3d 412, 434 (1st Dist. 2010). The controlling presumption is that the trial court properly considered all factors when coming to its sentencing determination. *See Brazziel*, 406 Ill. App. 3d at 434; *People v. Garcia*, 296 Ill. App. 3d 769, 781 (1st Dist. 1998). The trial court, having observed Defendant and the proceedings, has a far better opportunity to consider these factors than the reviewing court, which must rely on the "cold" record. *See People v. Alexander*, 239 Ill. 2d 205, 213 (2010), *citing People v. Fern*, 189 Ill. 2d 48, 53 (1999).

To convict Defendant of aggravated battery with a deadly weapon, the People must prove beyond a reasonable doubt that (1) in committing a battery Defendant used (2) a deadly weapon other than by discharge of a firearm. 720 ILCS 5/12-3.05(f)(1). In an aggravated battery case, the underlying offense that needs to be proved is battery, while the remaining elements serve to aggravate that battery. *See People v. Cherry*, 2016 IL 118728, ¶ 16. Here, Defendant argues the People did not meet the burden of proving that Defendant committed the battery, as no one could allegedly identify the assailant and the People allegedly could not demonstrate that that sharp object was used in a manner that could produce death. (D. Br. 8). Thus, the only question for this Court to consider is whether Defendant knowingly committed battery with a deadly weapon. Defendant did commit battery when he knowingly violated his order of protection and stabbed Mr. [redacted] five times. The sharp object Defendant used was a deadly weapon as it was used in a manner that could produce death.

A. Defendant committed a battery resulting in bodily harm to Mr. [redacted].

In this case, there is no dispute that the evidence adduced at trial was sufficient to prove Defendant's conduct resulted in a battery. And, in viewing the evidence in the light most favorable to the People, a rational trier of fact could find, beyond a reasonable doubt, that Defendant knowingly intended to inflict bodily harm to Mr. [redacted]. To prove battery beyond a reasonable doubt, the People must show Defendant (a) knowingly, (b) without legal justification by any means (c) caused bodily harm to an individual or (c) makes physical contact of an insulting or provoking nature. 720 ILCS 5/12-3.0.

The State can prove battery in two ways: first by showing that Defendant knowingly, without legal justification, caused bodily harm to an individual, and second, under the same circumstances, by making physical contact of an insulting provoking nature. *See People v. Mays*,

91 Ill.2d 251, 256 (1982). Because the charging instrument only referenced bodily harm, not physical contact of a provoking nature, the State only had to prove battery via element (c). 720 ILCS 5/12-3.0. It is the People's duty to prove the essential elements of a charged crime and these elements must be made known to the trier of fact. *See People v. Hussy*, 3 Ill.App.3d 955, 956-957 (1972) (finding the element of "without legal justification" is not an essential element of the charge of a battery). In the instant case, the essential elements the People had to prove were (a) and (c).

i. Defendant acted "knowingly, without legal justification" when he entered the [redacted] residence on March 12, 2015.

There was ample circumstantial evidence introduced in trial to establish beyond a reasonable doubt Defendant acted knowingly when he entered the residence in direct violation of his order of protection to seek out Mr. [redacted]. A person "acts knowingly" if "he is consciously aware that his conduct is of such nature" that it is "practically certain" to cause the result proscribed by the offense. *People v. Moore*, 358 Ill. App. 3d 683, 688 (1st Dist. 2005); *People v. Farrokhi*, 91 Ill.App.3d 421, 427 (1980); *see People v. Jasoni*, 2012 IL App (2d) 110217, ¶ 20. Whether a person acted knowingly with respect to bodily harm resulting from one's actions is often proved by circumstantial evidence, rather than by direct proof. *See People v. Lattimore*, 2011 IL App (1st) 093238, ¶ 44.

In *Latimore*, the defendant was convicted of aggravated battery and retail theft and sentenced to two years of mental health probation. *Id.* at ¶ 1. On appeal, the defendant argued that the trial court, that the State failed to prove beyond a reasonable doubt that defendant "knowingly" caused bodily harm to a security guard. *Id.* The appellate court disagreed with defendant and held that evidence adduced at trial showed defendant acted knowingly when he repeatedly tried to leave a store with merchandise he had not paid for, after each attempt led to a physical struggle with store personnel. *Id.* at ¶ 45. The court ruled that because the defendant was aware his conduct

increased the likelihood of store personnel getting injured, a rational trier of fact would have found that after engaging in repeated struggles, store personnel could be injured. *Id*.

Here, like in *Latimore*, Defendant exhibits the same knowing behavior because Defendant has previously engaged in conduct that would have caused Mr. [redacted] harm. The order of protection was issued to prevent Defendant from entering the residence, since Defendant was more likely to cause Mr. [redacted] harm if Defendant remained at [redacted]. (S.R. 100). The People introduced evidence showing Defendant was served with an order of protection in open court. [1] Further, Mrs. [redacted] testified that on March 12, at around 6:00 a.m., Defendant violated the order of protection by going up to the second level of the residence where he knew Mr. [redacted] would be sleeping. (S.R. 165). After viewing the evidence in the light most favorable to the State, the trial court correctly determined Defendant acted knowingly in the act of aggravated battery.

ii. Defendant, in stabbing Mr. [redacted] about the body five times, "cause[d] bodily harm."

Defendant inflicted bodily harm when he stabbed Mr. [redacted] five times in the back with a sharp object. Infliction of bodily harm is an essential element of battery. 720 ILCS 5/12-3.0. Bodily harm is defined as "some sort of physical pain or damage to the body, like lacerations, bruises or abrasions, whether temporary or permanent." *People v. Mays*, 91 Ill.2d 251, 256 (1982). Conduct of this nature does not have to rise to the same level as "great bodily harm," which requires injury of a more "grave and serious character than an ordinary battery." *People v. Figures*, 216 Ill.App.3d 398, 401 (1991).

In *Figures*, the defendant was convicted of aggravated battery, armed violence, and

[1] Even though the People did not need to prove defendant's behavior happened without legal justification, defendant violated his order of protection when he entered the residence on March 12, 2015.

attempted murder. *People v. Figures*, 216 Ill.App.3d 398, 399 (1991). On appeal, the defendant argued that the State did not prove the aggravated battery charge because the State failed to show the defendant caused great bodily harm. *Id.* The appellate court held the damage to the victim clearly rose to the level of bodily harm because evidence adduced at trial showed the victim was shot in the foot. *Id.* at 402. The court noted that even when the bullet only pierced the victim's shoe and did not penetrate skin, because the injury received medical attention and there was damage to the body, the level of harm was enough to satisfy a simple battery requirement. *Id.*

Similarly, in the case at bar, the trial court correctly returned a finding indicative of bodily harm for Count II. The evidence, consisting of the five lacerations, blood, and medical treatment, all unmistakably show bodily harm, considering there was damage to Mr. [redacted]'s body and Mr. [redacted] received medical treatment. (S.E. 232-237). Further, in this case, the injuries surpass the severity of those sustained by the victim in *Figures*, as Mr. [redacted] received more injuries, there was blood present, and medical attention was required. (S.R 143). Mr. [redacted] lost large quantities of blood, was transported to the hospital by ambulance, and not allowed to leave until later in the afternoon. (S.R. 143).

The People find *Parks* also instructive. In *Parks*, the defendant was found guilty of aggravated battery. *People v. Parks*, 50 Ill.App.3d 929, 930 (1977). The defendant appealed, arguing that the State failed to prove him guilty beyond a reasonable doubt. *Id.* at 933. Specifically, defendant believed that the lack of blood on the victim's glove and the victim's testimony that she was bleeding on her hand was not enough to prove bodily harm. *Id.* The court held that the defendant's claim lacked merit because testimonial evidence of the blood and attack was enough to show bodily harm. *Id.*

Like in *Parks*, the State introduced testimonial and photographic evidence of bodily harm.

At trial Mr. [redacted], Mrs. [redacted], and [redacted] all testified to the bleeding they saw on Mr. [redacted] after Defendant had left the residence. (S.R. 145, 158-159, 170). The People introduced photos of the blood that stained the sheets of Mr. [redacted]'s bed and [redacted] testified he could see the blood from the doorway of Mr. [redacted]'s bedroom. (S.E. 232; S.R. 158-159). Like the court found in *Parks*, the testimonial and photographic evidence of the blood from Mr. [redacted]'s stabbing presented at trial was enough to satisfy proving the essential element of bodily harm.

Defendant argues otherwise, but unconvincingly. Defendant initially contends that the Mrs. [redacted]'s testimony is not sufficient to support an aggravated battery conviction, because the recognition of the assailant comes from her, and not the victim, Mr. [redacted]. (D. Br. 9). Defendant points to no case law requiring the People to prove a victim must identify their assailant to prove up an aggravated battery conviction. Aggravated battery can be established by circumstantial evidence, if the manner of the injury and means by which is it inflicted may be inferred from the evidence produced. *See People v. Goodwin*, 24 Ill.App.3d 1090, 1094. Without reverting to *res ipsa loquitor*, People presented the following circumstantial evidence.

First, that Mrs. [redacted], [redacted], and Mr. [redacted] did not commit the battery. Mrs. [redacted] was getting ready for work, while [redacted] and Mr. [redacted] were asleep in their bedrooms' during the time of the attack. (S.R. 165, 170-171). Second, evidence showed that the wounds were on Mr. [redacted]'s back, making it difficult to conclude Mr. [redacted] stabbed himself. (S.R. 145-146; S.E. 234). Further, Mrs. [redacted]'s testimony placed Defendant upstairs, at the time of the incident. (S.R. 166). Five to ten minutes after defendant went upstairs, Mrs. [redacted] heard screams coming from Mr. [redacted]. (S.R. 167). After Mrs. [redacted] heard screams, she saw Defendant with a "real shiny object" that was "glaring" in Defendant's hand. (S.R. 168). Further, [redacted] testified that he did not have a weapon on March 12, 2015. (S.R. 158). Mr. [redacted]

also testified that he did not have the stab wounds on his back the night before. (S.R. 148). The People further presented photographic evidence of the blood and lacerations that Mr. [redacted] received to support the aforementioned testimonial evidence. (S.E. 232-237). Collectively, the photographic evidence produced at trial proved that Mr. [redacted] was stabbed with a sharp object, likely the "real shiny" object Defendant was holding as Defendant ran down the stairs, successfully proving bodily harm. (S.R. 167).

Defendant's argument erroneously requests this Court to find that, as a matter of law, when a defendant is acquitted of great bodily harm, it should follow that defendant is also acquitted of bodily harm. (D. Br. 14). The People are only required to prove up the essential elements of the charging instrument. *See People v Rothermel*, 88 Ill.2d 541, 544. Here, section 3.05 of the Criminal Code of 2012 instructs that to prove aggravated battery under (f)(1), the People only need to prove bodily harm, not great bodily harm. 720 ILCS 5/12-3.05(f)(1). This does not "bolster" Defendant's conclusion (D. Br. 14), as the People have introduced enough evidence to show Mr. [redacted] sustained bodily harm. As mentioned above, Mr. [redacted] testified to physical pain when he woke up after feeling something "hit him" on the back. (S.R. 141). Further, Mr. [redacted], Mrs. [redacted] and [redacted] testified to lacerations and blood from the lacerations that were on Mr. [redacted] and covered the bedding. (S.R. 145, 158-159, 170). After looking at the evidence, in the light most favorable to the People, the People met their burden of proving the essential element of bodily harm.

B. The "sharp object" defendant used to stab Mr. Calhoun became a deadly weapon when it was used in a manner capable of producing death.

On March 12, 2015, Defendant used a "real shiny" sharp object in a manner to produce death when he entered the [redacted] residence and stabbed Mr. [redacted] five times in the back while Mr. [redacted] was sleeping. The final essential element the People must prove is that Defendant

used a deadly weapon. Defendant argues *Carter* is instructive. In *Carter*, the court defined a deadly weapon as

> an instrument that is used or may be used for the purpose of an offense or defense and capable of producing death. Some weapons are deadly per se; others, owing to the manner in which they are used, become deadly. A gun, pistol, or dirkknife is itself deadly, while a small pocket knife, (emphasis supplied) a cane, a riding whip, a club or baseball bat may be so used as to be a deadly weapon. [citation omitted]. Those instrumentalities not considered deadly per se may thus clearly become such by the manner in which they are used.
>
> *People v. Carter*, 410 Ill. 462, 465 (1951) (*quoting People v. Dwyer*, 324 Ill. 363, 364 (1927).

The *Carter* court created two categories of deadly weapons: those that are *per* say deadly, and those that become deadly if used in a manner capable of producing death. *Id.* at 465.

Assuming, *arguendo* that the weapon at issue was not a *per se* deadly, if the character of the weapon is doubtful, or hinges on a question of the manner of its use, the issue is left to the trier of fact to decide from the description of the weapon, manner it was used, and the circumstances of the case. *People v. Olsen*, 161 Ill. App.3d 945, 949 (1987) (*citing People v. Dwyer*, 324 Ill. 363, 365 (1927). Therefore, to determine if a deadly weapon is present in the instant case, the Court must look not at the damage the weapon caused, but to the manner in which the defendant used the weapon. A weapon is used in a manner capable of producing death when an assailant targets a vital part of the victim's body with a weapon that is not *per* se deadly. *People v. Carter*, 410 Ill. 462, 466; *see also People v Stanley*, 369 Ill.App.3d 441, 446 (2006).

In *Carter*, the defendant sustained a conviction of assault with intent to murder. *People v. Carter*, 410 Ill. 462, 463 (1951). On appeal, the defendant argued that the evidence the State introduced failed to prove beyond a reasonable doubt the elements necessary to sustain a conviction of assault with a deadly weapon with intent to commit murder. *Id.* at 463-64. Specifically, that the State failed to prove the use of a deadly or dangerous weapon. *Id.* The

supreme court held that when the defendant used a small pocketknife with a 2-inch blade, while not *per se* deadly, it was capable of producing death. *Id.* at 466. The court noted that because the defendant wielded the pocketknife while delivering a blow to the victim's head, a vital part of the victim's body, this was enough to show the defendant used the pocketknife in a manner capable of producing death. *Id.*

Similarly to *Carter*, in the case at bar, Mr. [redacted] received a stab wound in the neck, a vital part of the body. (S.R. 146; S.E. 235). Had the stabbing performed by the Defendant hit a major artery, combined with the motive introduced by the State in the evidence of other crimes, Defendant could have been charged with murder. Evidence introduced at trial showed that Mr. [redacted] received multiple stab wounds on the back, under the arm and on the neck, further indicating Defendant did not stop after one attempt to harm Mr. [redacted]. (S.E. 234-237). The way Defendant wielded the sharp object proves Defendant used the "sharp object" in manner capable of producing death when stabbing Mr. [redacted].

Defendant finds *Stanley* and *Blanks* as instructive, mistakenly arguing these cases prove the "real shiny silver object" in the case at bar does not rise to the classification of a deadly weapon. (D. Br. 13). While Defendant correctly uses *Carter* to establish there are two categories of deadly weapons, Defendant incorrectly distinguishes both *Stanley* and *Banks*, as they show support for the facts presented by People, not the Defendant.

END OF EXERPT

Applicant Details

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Contact Phone Number	**2039136030**

Applicant Education

BA/BS From	**University of Connecticut**
Date of BA/BS	**May 2017**
JD/LLB From	**The University of Chicago Law School** **https://www.law.uchicago.edu/**
Date of JD/LLB	**June 4, 2022**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Law Review**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Hinton Moot Court**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**No**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

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This applicant has certified that all data entered in this profile and any application documents are true and correct.